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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 65

DOUGLAS FAIRBANKS, PETITIONER,

v.s.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED MAY 28, 1938.

CERTIORARI GRANTED JANUARY 16, 1939.



SUPREME COURT OF THE UNITED STATES

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Names and Addresses of Attorneys.

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For Appellee and Cross-Appellant:

PEIRSON M. HALL, Esq.,

United States Attorney,

ALVA G. BAIRD, Esq.,

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United States of America, ss.

To UNITED STATES OF AMERICA, PEIRSON M.
HALL, ESQ., United States Attorney, E. H.
MITCHELL, ESQ., Special Assistant United States
Attorney, and to ALVA C. BAIRD, Assistant
United States Attorney, Attorneys for said United
States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 31st day of December, A. D. 1936, pursuant to Order allowing Appeal, filed December 2, 1936, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case entitled United States of America v. Douglas Fairbanks, Docket No. 6680-J, wherein United States of America is plaintiff and respondent and Douglas Fairbanks is defendant and appellant, and you are ordered to show cause, if any there be, why the Judgment rendered against the defendant and appellant on October 5, 1936, in the said action mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM P. JAMES United States District Judge for the Southern District of California, this 2nd day of December, A. D. 1936, and of the Independence of the United States the one hundred and sixtieth.

Wm. P. James

U. S. District Judge for the Southern District of California.

Due service of within Citation by receipt of true copy
is hereby acknowledged this 2nd day of December, A. D.
1936.

Peirson M. Hall

Peirson M. Hall,

United States Atty.

E. H. Mitchell

E. H. Mitchell,

Special Asst. United States Attorney.

Alva C. Baird

Alva C. Baird,

Asst. United States Attorney.

Attorneys for United States of America.

[Endorsed]: Filed Dec. 3, 1936. R. S. Zimmerman,
Clerk. By L. B. Figg, Deputy Clerk.

United States of America, ss.

To Douglas Fairbanks and to Claude I. Parker & Ralph W. Smith, his attorneys: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 28 day of January, A. D. 1937, pursuant to petition for cross-appeal and order allowing the same filed Dec. 29, 1936, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled United States vs. Douglas Fairbanks, No. 6680-J, wherein United States is plaintiff and cross-appellant and you are defendant and cross-appellee to show cause, if any there be, why the Judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES United States District Judge for the Southern District of California, this 29 day of December, A. D. 1936, and of the Independence of the United States, the one hundred and sixty-first

Wm. P. James
U. S. District Judge for the Southern District
District of California.

[Endorsed]: Service of a copy of the above citation, together with a copy of petition for cross-appeal, order allowing cross-appeal, and plaintiff's and cross-appellant's assignment of errors is hereby acknowledged this 29 day of December, 1936. Claude I. Parker By John B. Milliken Attorneys for Defendant and Cross-Appellee. Filed Dec 29 1936 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)

) 6680 J

Plaintiff,)

) COMPLAINT

vs.)

) For Recovery of

DOUGLAS FAIRBANKS,)

Taxes

) Erroneously

Defendant)

Refunded.

Plaintiff, United States of America, by Peirson M. Hall, United States Attorney, in and for the Southern District of California, Central Division, Alva C. Baird, Assistant United States Attorney in and for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, sues the defendant, Douglas Fairbanks, in this, its first cause of Action, for money had and received in the sum of One Hundred Fifty-four Thousand, One Hundred Eighty-seven and Twenty-four One Hundredths (\$154,187.24) Dollars, with Interest thereon as provided by Law, until paid, and for the costs of this action, says for its first cause of action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood

in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes," approved February 26, 1926 (44 Stat. 9.) which is hereinafter referred to as the Revenue Act of 1926, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, the defendant, Douglas Fairbanks, on or about March 14, 1928 filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1927, upon Form 1040, commonly known as an Individual Income Tax Return.

V.

That in his said income tax return for the calendar year 1927, the defendant, Douglas Fairbanks, reported a net income of \$50,817.31, and a capital net gain of \$1,600,000.00 received from the Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year 1927, from

which defendant took no deduction for cost, and which was returned for taxation at the capital gain rate of 12½%, for said year 1927, and said return disclosed a tax due thereon in the amount of \$205,113.99 which was duly assessed by the United States Commissioner of Internal Revenue on his 1928 Serial or Account Number 304130 Assessment List and was paid by the defendant in quarterly installments of \$51,278.50 each on March 12, 1928, June 14, 1928, September 13, 1928 and December 14, 1928.

VI.

That thereafter and on or about August 29, 1930, the defendant, Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue, a claim and application for the refund of \$53,231.55 of the sum paid by him as Income Taxes for the taxable year 1927 and in said claim alleged as a ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts & Disbursements basis and Income Tax returns filed accordingly.

"At conferences with a Special Conference Committee held during March - 1929 in Washington, D. C., it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year and 5% the fourth year.

"On March 5th, 1925, I exchanged my interests in various completed motion pictures and other assets for \$4,000,000.00 par value debenture bonds, payable over a period of ten years and 990 shares of no par value stock of The Elton Corporation. The value of the pictures

and other assets exchanged was established in my agreement with the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7th, 1930, at \$1,096,445.52.

"On April 5th, 1927, and subsequently thereto, during the year 1927, The Elton Corporation called and paid me for \$1,600,000.00 par value debenture bonds. Inasmuch as my income tax returns have been filed on a Cash Receipts & Disbursements basis and consequently the entire cost of pictures deducted from my income within the years expended, I treated the entire \$1,600,000.00 as capital net gain and so reported same on my 1927 income tax return and paid tax on same accordingly.

"Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927, as stated above, and the value of the bonds and other assets established at \$1,096,445.52, I should be permitted to treat the percentage of \$1,096,445.52 that \$1,600,000.00 is to \$4,000,000.00 as cost of said bonds redeemed. Since \$1,600,000.00 is 40% of \$4,000,000.00 and 40% of \$1,096,445.52 is \$438,578.21, there remains \$1,161,421.79 capital net gain instead of \$1,600,000.00 as originally reported.

"The tax on this capital net gain is to be offset by the disallowance of deductions claimed against ordinary income in the amount of \$8,271.97 as reflected in Revenue Agent, L. E. Fellers report dated August 7, 1930, leaving a net overpayment of \$53,231.55.

"Refund of interest on the overpayment is also claimed under provision section #614, Revenue Act of 1928."

VII.

That thereafter an audit was made of the defendant's said 1927 return, in connection with said claim for refund, under the direction of the Commissioner of Internal Revenue. As a result thereof, the Commissioner of Internal Revenue determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1927 in the amount of \$438,578.21, being the proportionable amount of cost attributable to the capital gain so reported, with a corresponding reduction in his capital gain tax returned and a reduction in his total tax liability.

VII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 2155767 was duly scheduled by the Commissioner of Internal Revenue on overassessment schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in defendant's 1927 return in the amount of \$53,231.55 as tax and \$9,795.05 as interest, which said amounts were duly determined to be refundable as an overpayment of defendant's 1927 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from the Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year 1927 constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr. v. Commissioner, 27 B. T. A. 463, and not capital gain; but that the gross income of \$1,600,000.00 received from said source should be reduced by the sum of \$438,578.21, rep-

resenting the proportionate cost of the particular bonds redeemed by the said Elton Corporation during the year 1927. The result of said redetermination of defendant's tax liability for the year 1927 discloses a deficiency in the tax reported upon his return in the amount of \$91,160.64 instead of an overpayment of tax in the sum of \$53,231.55 as previously determined by the Commissioner of Internal Revenue.

X.

That said claim for refund of \$53,231.55 of the sum paid by the defendant, Douglas Fairbanks, as a tax upon his reported net income and capital gains for the calendar year 1927 was through mistake and error as to the applicable taxing statute mistakenly and erroneously allowed by the United States Commissioner of Internal Revenue, and said amount of \$53,231.55 of said 1927 taxes, together with interest thereon in the sum of \$9,795.05 were, on January 26, 1932, duly refunded to the defendant by delivery to him of the check of the disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$1,600,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1927. That by reason of said mistake the said Commissioner of Internal Revenue failed to assess an additional tax against the defendant in the sum of \$91,160.64 for the taxable year 1927, although said additional tax was, and now is justly due, owing and wholly unpaid from said defendant to the plaintiff.

XII.

That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in allowing defendant's claim for refund of a portion of his 1927 taxes as set forth above, the said sum of \$53,231.55 and interest thereon in the amount of \$9,795.05 were mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1927 when the refund was made.

XIII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928 (45 Stat. 791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon. That under said Section of the Revenue Act, Plaintiff is further entitled to recover an additional amount of \$91,160.64, together with interest thereon from the 15th day of March, 1928, from defendant.

XIV.

That defendant, though liable to repay said sum of \$53,231.55 with interest thereon in the amount of \$9,795.05, and to pay the additional amount of \$91,160.64 with interest thereon, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sums, or any part thereof to the plaintiff. That none of said sums or any part thereof have been repaid or paid to the plaintiff by the

defendant, or by any person or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$53,231.55, with interest thereon in the amount of \$9,795.05, on account of the refund so made on or about the 26th day of January, 1932, and the further sum of \$91,160.64 as an additional amount due but unreported on his said income tax return filed for the calendar year 1927.

SECOND CAUSE OF ACTION

Plaintiff sues the defendant in this, its second cause of action, for money had and received in the sum of \$13,697.21 with interest thereon as provided by law until paid and says for its second cause of action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes," approved May 29, 1928 (45 Stat. 791-875.), which is hereinafter referred to as the Revenue Act of 1928, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, the defendant, Douglas Fairbanks, on or about March 12, 1929 filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1928, upon Form 1040, commonly known as an Individual Income Tax Return. Defendant filed an Amended Individual Income Tax Return upon Form 1040 on July 12, 1929, for said Calendar Year.

V.

That in his said income tax returns for the calendar year 1928 the defendant, Douglas Fairbanks, reported a net income of \$69,024.72, a capital net gain of \$150,000.00 received from the Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year of 1928, from which defendant took no deduction for cost, and which was returned for taxation at the capital gain rate of 12- $\frac{1}{2}$ %, for said year 1928, and said original income tax return disclosed a tax due thereon in the amount of \$28,878.66 which was duly assessed by the United States Commissioner of Internal Revenue on his 1929 Assessment List, Serial or Account Number 303283 and was paid by the defendant in quarterly installments of \$7,219.67 or \$7,219.66 each on March 12, 1929, June 14, 1929, September 13, 1929 and December 14, 1929.

VI.

That thereafter and on or about August 29, 1930, the defendant, Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue a claim and application for the refund of \$7,507.38 of the sum paid by him as income taxes for the taxable year 1928 and in said claim alleged as a ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts & Disbursements basis and Income Tax returns filed accordingly.

"At conferences with a Special Conference Committee held during March - 1929 in Washington, D. C., it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year and 5% the fourth year.

"On March 5th, 1925, I exchanged my interests in various completed motion pictures and other assets for \$4,000,000.00 par value debenture bonds, payable over a period of ten years and 990 shares of no par value stock of The Elton Corporation. The value of the pictures and assets exchanged was established in my agreement with the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7, 1930, at \$1,096,445.52.

"During the year 1928, the Elton Corporation called and paid me for \$150,000.00 par value debenture bonds. Inasmuch as my income tax returns have been filed on a Cash Receipts & Disbursements basis and consequently the entire cost of pictures deducted from my income

within the years expended, I treated the entire \$150,000.00 as capital net gain and so reported same on my 1928 income tax return and paid tax on same accordingly.

"Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927 and the value of the bonds and other assets established at \$1,096,445.52, I should be permitted to treat the percentage of \$1,096,-445.52 that \$150,000.00 is to \$4,000,000.00 as cost of said bonds redeemed. Since \$150,000.00 is 3.75% of \$4,000,-000.00 and 3.75% of \$1,096,445.52 is \$41,116.71, there remains \$108,883.29 capital net gain instead of \$150,-000.00 as originally reported.

"In addition to this decrease in capital net gain, additional deductions are claimed against ordinary net income in the net amount of \$11,136.55 as reflected in Revenue Agent L. E. Fellers report dated August 7, 1930, of this amount \$10,747.49 is deduction from ordinary net income as reflected in my amended return. This leaves a net overpayment for 1928 of \$7,507.38.

"Refund of interest on the overpayment is also claimed under provision section #614, Revenue Act of 1928."

VII.

That thereafter an audit was made of the defendant's said 1928 returns, in connection with said claim for refund, under the direction of the Commissioner of Internal Revenue. As a result thereof, the Commissioner of Internal Revenue determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1928 in the amount of \$41,116.71, being the proportionable amount of cost attributable to the capital gain so

reported, with a corresponding reduction in his capital gain tax returned and a reduction in his total tax liability.

VIII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 2,155,721 was duly scheduled by the Commissioner of Internal Revenue on overassessment schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in defendant's 1928 return in the amount of \$7,507.38 as tax and \$932.40 as interest, which said amounts were duly determined to be refundable as an overpayment of defendant's 1928 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from the Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year 1928 constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr. v. Commissioner, 27 B. T. A. 463, and not capital gain, but that the gross income of \$150,000.00 received from said source should be reduced by the sum of \$41,116.71, representing the proportionate cost of the particular bonds redeemed by the said Elton Corporation during the year 1928. The result of said redetermination of defendant's tax liability for the year 1928 discloses a deficiency in the tax reported upon his return in the amount of \$5,257.43 instead of an overpayment of tax in the sum of \$7,507.38 as previously determined by the Commissioner of Internal Revenue.

X.

That said claim for refund of \$7,507.38 of the sum paid by the defendant, Douglas Fairbanks, as a tax upon his

reported net income and capital gains for the calendar year 1928 was through mistake and error as to the applicable taxing statute mistakenly and erroneously allowed by the United States Commissioner of Internal Revenue, and said amount of \$7,507.38 of said 1928 taxes, together with interest thereon in the sum of \$932.40 were, on January 26, 1932, duly refunded to the defendant by delivery to him of the check of the disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$150,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1928. That by reason of said mistake the said Commissioner of Internal Revenue failed to assess an additional tax against the defendant in the sum of \$5,257.43 for the taxable year 1928, although said additional tax was, and now is justly due, owing and wholly unpaid from said defendant to the plaintiff.

XII.

That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in allowing defendant's claim for refund of a portion of his 1928 taxes as set forth above, the said sum of \$7,507.38 and interest thereon in the amount of \$932.40 were mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1928 when the refund was made.

XIII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928, (45 Stat. 791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon. That under said Section of the Revenue Act, Plaintiff is further entitled to recover an additional amount of \$5,257.43, together with interest thereon from the 15th day of March, 1929, from defendant.

XIV.

That defendant, though liable to repay said sum of \$7,507.38 with interest thereon in the amount of \$932.40, and to pay the additional amount of \$5,257.43 with interest thereon, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sums, or any part thereof to the plaintiff. That none of said sums or any part thereof have been repaid or paid to the plaintiff by the defendant, or by any person or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$7,507.38, with interest thereon in the amount of \$932.40, on account of the refund so made on or about the 26th day of January, 1932, and the further sum of \$5,257.43 as an additional amount due but unreported on his said income tax return filed for the calendar year 1928.

THIRD CAUSE OF ACTION

Plaintiff sues the defendant in this, its Third Cause of Action, for money had and received in the sum of \$8,042.66 with interest thereon as provided by law until paid and says for its Third Cause of Action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes," approved May 29, 1928 (45 Stat. 791-875), which is hereinafter referred to as the Revenue Act of 1928, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of

the Treasury, the defendant, Douglas Fairbanks, on or about March 14, 1930, filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1929, upon Form 1040, commonly known as an Individual Income Tax Return.

V.

That in his said income tax return for the calendar year 1929 the defendant, Douglas Fairbanks, reported a net income of \$26,204.28, a capital net gain of \$150,000.00 received from the Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year 1929, from which he took a deduction for cost in the amount of \$34,823.65, that being the proportionate amount of cost attributable to the capital gain received, and reported the balance of \$115,176.35 for taxation at the capital gain rate of 12½%, for said year 1929, and said income tax return disclosed a tax due thereon in the amount of \$54,135.85 which was duly assessed for the United States Commissioner of Internal Revenue on his 1930 Assessment List, Serial or Account Number 302363 and was paid by the defendant in quarterly installments of \$13,533.97 on March 1, 1930, June 14, 1930, September 15, 1930 and December 15, 1930.

VI.

That thereafter and on or about August 2, 1930, the defendant, Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue a claim for refund which was not accepted as such, but as additional information to be attached to defendant's income tax return for the calendar year 1928.

VII.

That thereafter an audit was made of the defendant's said 1929 return under the direction of the Commissioner of Internal Revenue. As a result thereof the Commissioner of Internal Revenue determined that the defendant was *entitled* a refund for the calendar year 1929.

VIII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 1256718, was duly scheduled by the Commissioner of Internal Revenue on Overassessment Schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in the amount of \$677.57 as tax and \$42.99 as interest, which said amounts were duly determined to be refundable as an overpayment of defendant's 1929 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from the Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year 1929, constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr. v. Commissioner, 27 B. T. A. 463, and not capital gain. The result of said redetermination of defendant's tax liability for the year 1929 discloses a deficiency in the tax reported upon his return in the amount of \$7,322.10 instead of an overpayment of tax in the sum of \$677.57 as previously determined by the Commissioner of Internal Revenue.

X.

That through mistake and error as to the applicable taxing statute, the United States Commissioner of Internal Revenue mistakenly and erroneously allowed the said

amount of \$677.57 of said 1929 taxes, together with interest thereon in the sum of \$42.99 as an overassessment of defendant's tax for the taxable year 1929 and said sums were on January 26, 1932, duly refunded to the defendant by delivery to him of the check of the disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$150,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1929. That by reason of said mistake the said Commissioner of Internal Revenue failed to assess an additional tax against the defendant in the sum of \$7,322.10 for the taxable year 1929, although said additional tax was, and now is justly due, owing and wholly unpaid from said defendant to the plaintiff.

XII.

That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in refunding a portion of the defendant's 1929 tax, as set forth above, the said sum of \$677.57 and interest thereon in the amount of \$42.99, was mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1929 when the refund was made.

XIII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928 (45 Stat.

791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon. That under said Section of the Revenue Act, Plaintiff is further entitled to recover an additional amount of \$7,322.10, together with interest thereon from the 15th day of March, 1930, from defendant.

XIV.

That defendant, though liable to repay said sum of \$677.57 with interest thereon in the amount of \$42.99, and to pay the additional amount of \$7,322.10, with interest thereon, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sums, or any part thereof to the plaintiff. That none of said sums or any part thereof have been repaid or paid to the plaintiff by the defendant, or by any person or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$677.57, with interest thereon in the amount of \$42.99, on account of the refund so made on or about the 26th day of January, 1932, and the further sum of \$7,322.10 as an additional amount due but unreported on his said income tax return filed for the calendar year 1927.

WHEREFORE, Plaintiff prays judgment against the defendant as follows:

1. For the sum of \$63,026.60 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;

2. For the sum of \$91,160.64 with interest thereon from the 15th day of March, 1928, to date of judgment at the rate of six per cent (6%) per annum;
3. For the sum of \$8,439.78 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;
4. For the sum of \$5,257.43 with interest thereon from the 15th day of March, 1929 to date of judgment at the rate of six per cent (6%) per annum;
5. For the sum of \$720.56 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;
6. For the sum of \$7,322.10 with interest thereon from the 15th day of March, 1930 to date of judgment at the rate of six per cent (6%) per annum;
7. For plaintiff's costs and disbursements in this action expended.

Peirson M. Hall

PEIRSON M. HALL

United States Attorney,

Alva G. Baird

E. H.

ALVA G. BAIRD

Assistant U. S. Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Special Attorney,

Bureau of Internal Revenue,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 20, 1934. R. S. Zimmerman,
Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

AMENDED COMPLAINT.

Plaintiff, United States of America, by Peirson M. Hall, United States Attorney, in and for the Southern District of California, Central Division, Alva C. Baird, Assistant United States Attorney in and for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, sues the defendant, Douglas Fairbanks, in this, its first Cause of Action, for money had and received in the Sum of Sixty-three thousand twenty-six and 60/100 (\$63,026.60) Dollars, with interest thereon as provided by Law, until paid, and for the costs of this action, says for its First Cause of Action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes," approved February 26, 1926, (44 Stat. 9.), which is hereinafter referred to as the Revenue Act of 1926, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, the defendant, Douglas Fairbanks, on or about March 14, 1928, filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1927, upon Form 1040, commonly known as an Individual Income Tax Return.

V.

That in his said income tax return for the calendar year 1927, the defendant, Douglas Fairbanks, reported a net income of \$50,817.31, and a capital net gain of \$1,600,000.00 received from the Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year 1927, from which defendant took no deduction for cost, and which was returned for taxation at the capital gain rate of 12 1/2%, for said year 1927, and said return disclosed a tax due thereon in the amount of \$205,113.99 which was duly assessed by the United States Commissioner of Internal Revenue on his 1928 Serial or Account Number 304130 Assessment List and was paid by the defendant in quarterly installments of \$51,278.50 each on March 12, 1928, June 14, 1928, September 13, 1928 and December 14, 1928.

VI.

That thereafter and on or about August 29, 1930, the defendant, Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue a claim and application for the refund of \$53,231.55 of the sum paid by him as income taxes for the taxable year 1927 and in said claim alleged as a ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts and Disbursements basis and Income Tax returns filed accordingly.

"At conferences with a Special Conference Committee held during March - 1919 Washington, D. C., it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year and 5% the fourth year.

"On March 5th, 1925, I exchanged my interests in various completed motion pictures and other assets for \$4,000,000.00 par value debenture bonds, payable over a period of ten years, and 990 shares of no par value stock of The Elton Corporation. The value of the pictures and other assets exchanged was established in my agreement with the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7, 1930, at \$1,096,445.52.

"On April 5th, 1927, and subsequently thereto, during the year 1927, the Elton Corporation called and paid me for \$1,600,000.00 par value debenture bonds. Inasmuch as my income tax returns have been filed on a Cash Receipts and Disbursements basis and consequently the

entire cost of pictures deducted from my income within the years expended, I treated the entire \$1,600,000.00 as capital net gain and so reported same on my 1927 income tax return and paid tax on same accordingly.

"Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927, as stated above, and the value of the bonds and other assets established at \$1,096,-445.52, I should be permitted to treat the percentage of \$1,096,445.52 that \$1,600,000.00 is to \$4,000,000.00 as cost of said bonds redeemed. Since \$1,600,000.00 is 40% of \$4,000,000.00 and 40% of \$1,096,445.52 is \$438,-578.21, there remains \$1,161,421.79 capital net gain instead of \$1,600,000.00 as originally reported.

"The tax on this capital net gain is to be offset by the disallowance of deductions claimed against ordinary income in the amount of \$8,271.97 as reflected in Revenue Agent, L. E. Fellers' report dated August 7, 1930, leaving a net overpayment of \$53,231.55.

"Refund of interest on the overpayment is also claimed under provision of Section #614, Revenue Act of 1928."

VII.

That thereafter an audit was made of the defendant's said 1927 return, in connection with said claim for refund, under the direction of the Commissioner of Internal Revenue. As a result thereof, the Commissioner of Internal Revenue determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1927 in the amount of \$438,578.21, being the proportionable amount of cost attributable to the capital gain so reported, with a corresponding reduction in his

capital gain tax returned and a reduction in his total tax liability.

VIII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 2155767 was duly scheduled by the Commissioner of Internal Revenue on overassessment Schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in defendant's 1927 return in the amount of \$53,231.55, as tax, and \$9,795.05 as interest, which said amounts were erroneously determined to be refundable as an overpayment of defendant's 1927 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from the Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year, 1927, constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr., v. Commissioner, 27 B. T. A. 463, and not capital gain, but that the gross income of \$1,600,000.00 received from said source should be reduced by the sum of \$438,578.21, representing the proportionate cost of the particular bonds redeemed by the said Elton Corporation during the year 1927. The result of said redetermination of defendant's tax liability for the year 1927 discloses a deficiency in the tax reported upon his return in the amount of \$91,160.64 instead of an overpayment of tax in the sum of \$53,231.55 as previously determined by the Commissioner of Internal Revenue.

X.

That said claim for refund of \$53,231.55 of the sum paid by the defendant, Douglas Fairbanks, as a tax upon his reported net income and capital gains for the calendar year 1927 was through mistake and error as to the applicable taxing statute mistakenly and erroneously allowed by the United States Commissioner of Internal Revenue, and said amount of \$53,231.55 of said 1927 taxes, together with interest thereon in the sum of \$9,795.05 were, on January 26, 1932, erroneously refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$1,600,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1927. That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in allowing defendant's claim for refund of a portion of his 1927 taxes as set forth above, the said sum of \$53,231.55 and interest thereon in the amount of \$9,795.05 were mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1927 when the refund was made.

XII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928, (45 Stat.

791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon.

XIII.

That defendant, though liable to repay said sum of \$53,231.55 with interest thereon in the amount of \$9,795.05, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sum, or any part thereof to the plaintiff. That no part of said sum has been repaid or paid to the plaintiff by the defendant, or by any person or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$53,231.55, with interest thereon in the amount of \$9,795.05, on account of the refund so made on or about the 26th day of January, 1932.

SECOND CAUSE OF ACTION.

Plaintiff sues the defendant in this, its second cause of action, for money had and received in the sum of \$8,439.78 with interest thereon as provided by law until paid and says for its second cause of action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood in the County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes", approved May 29, 1928 (45 Stats. 791-875), which is hereinafter referred to as the Revenue Act of 1928, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the Approval of the Secretary of the Treasury, the defendant, Douglas Fairbanks, on or about March 12, 1929, filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1928, upon Form 1040, commonly known as an Individual Income Tax Return. Defendant filed an Amended Individual Income Tax Return upon Form 1040 on July 12, 1929, for said Calendar Year.

V.

That in his said income tax returns for the calendar year 1928 the defendant, Douglas Fairbanks, reported a net income of \$69,024.72, a capital net gain of \$150,000.00 received from the Elton Corporation, in redemption and retirement of that amount of its corporate bonds at par value during the calendar year of 1928, from which defendant took no deduction for cost, and which was re-

turned for taxation at the capital gain rate of 12 1/2% for said year 1928, and said original income tax return disclosed a tax due thereon in the amount of \$28,878.66 which was duly assessed by the United States Commissioner of Internal Revenue on his 1929 Assessment List, Serial or Account Number 303283 and was paid by the defendant in quarterly installments of \$7,219.67 or \$7,219.66 each on March 12, 1929, June 14, 1929, September 13, 1929 and December 14, 1929.

VI.

That thereafter and on or about August 29, 1930, the defendant Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue a claim and application for the refund of \$7,507.38 of the sum paid by him as income taxes for the taxable year 1928 and in said claim alleged as a ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts and Disbursements basis and Income Tax returns filed accordingly.

"At conferences with a Special Conference Committee held during March - 1929 in Washington, D. C., it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year, and 5% the fourth year.

"On March 5th, 1925, I exchanged my interests in various completed motion pictures and other assets for \$4,000,000.00 par value debenture bonds, payable over a period of ten years and 990 shares of no par value stock of the Elton Corporation. The value of the pictures and assets exchanged was established in my agreement with

the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7, 1930, at \$1,096,445.52.

"During the year 1928, the Elton Corporation called and paid me for \$150,000.00 par value debenture bonds. Inasmuch as my income tax returns have been filed on a Cash Receipts and Disbursements basis and consequently the entire cost of pictures deducted from my income within the years expended, I treated the entire \$150,000.00 as capital net gain and so reported same on my 1928 income tax return and paid tax on same accordingly.

“Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927 and the value of the bonds and other assets established at \$1,096,445.52, I should be permitted to treat the percentage of \$1,096,-445.52 that \$150,000.00 is to \$4,000,000.00 as cost of said bonds redeemed. Since \$150,000.00 is 3.75% of \$4,000,000.00 and 3.75% of \$1,096,445.52 is \$41,116.71, there remains \$108,883.29 capital net gain instead of \$150,000.00 as originally reported.

"In addition to this decrease in capital net gain, additional deductions are claimed against ordinary net income in the net amount of \$11,136.55, as reflected in Revenue Agent L. E. Fellers' report dated August 7, 1930. Of this amount \$10,747.49 is deduction from ordinary net income as reflected in my amended return. This leaves a net overpayment for 1928 of \$7,507.38.

"Refund of interest on the overpayment is also claimed under provision section #614, Revenue Act of 1928."

VII.

That thereafter an audit was made of the defendant's said 1928 returns, in connection with said claim for refund, under the direction of the Commissioner of Internal Revenue. As a result thereof, the Commissioner of Internal Revenue determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1928 in the amount of \$41,116.71, being the proportionable amount of cost attributable to the capital gain so reported, with a corresponding reduction in his capital gain tax returned and a reduction in his total tax liability.

VIII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 2,155,721 was duly scheduled by the Commissioner of Internal Revenue on overassessment schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in defendant's 1928 return in the amount of \$7,507.38 as tax and \$932.40 as interest, which said amounts were erroneously determined to be refundable as an overpayment of defendant's 1928 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from the Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year 1928 constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr. v. Commissioner, 27 B. T. A. 463, and not capital gain, but that the gross income of \$150,000.00 received from said source

should be reduced by the sum of \$41,116.71, representing the proportionate cost of the particular bonds redeemed by the said Elton Corporation during the year 1928.

X.

That said claim for refund of \$7,507.38 of the sum paid by the defendant, Douglas Fairbanks, as a tax upon his reported net income and capital gains for the calendar year 1928 was through mistake and error as to the applicable taxing statute mistakenly and erroneously allowed by the United States Commissioner of Internal Revenue, and said amount of \$7,507.38 of said 1928 taxes, together with interest thereon in the sum of \$932.40 were, on January 26, 1932, erroneously refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$150,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1928. That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in allowing defendant's claim for refund of a portion of his 1928 taxes as set forth above, the said sum of \$7,507.38 and interest thereon in the amount of \$932.40 were mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1928 when the refund was made.

XII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928, (45 Stat. 791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon.

XIII.

That defendant, though liable to repay said sum of \$7,507.38 with interest thereon in the amount of \$932.40, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sum, or any part thereof to the plaintiff. That no part of said sum has been repaid or paid to the plaintiff by the defendant, or by any person or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$7,507.38, with interest thereon in the amount of \$932.40, on account of the refund so made on or about the 26th day of January, 1932.

THIRD CAUSE OF ACTION.

Plaintiff sues the defendant in this, its Third Cause of Action, for money had and received in the sum of \$720.56 with interest thereon as provided by law until paid and says for its Third Cause of Action:

I.

That at all times hereinafter mentioned the plaintiff was and now is a corporation sovereign and body politic.

II.

That the defendant, Douglas Fairbanks, is a citizen of the United States and a resident of the City of Hollywood, in the County of Los Angeles, State of California, within the jurisdiction of the court.

III.

That this is a suit at law by the United States, of a civil nature, arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

IV.

That under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes," approved May 29, 1928 (45 Stat. 791-875), which is hereinafter referred to as the Revenue Act of 1928, and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury the defendant, Douglas Fairbanks, on or about March 14, 1930, filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, an income tax return for the calendar year 1929, upon Form 1040, commonly known as an Individual Income Tax Return.

V.

That in his said income tax return for the calendar year 1929 the defendant, Douglas Fairbanks, reported a net income of \$26,204.28, a capital net gain of \$150,000.00

received from The Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year 1929, from which he took a deduction for cost in the amount of \$34,823.65, that being the proportionate amount of cost attributable to the capital gain received, and reported the balance of \$115,-176.35 for taxation at the capital gain rate of 12½%, for said year 1929, and said income tax return disclosed a tax due thereon in the amount of \$54,135.85 which was duly assessed for the United States Commissioner of Internal Revenue on his 1930 Assessment List, Serial or Account Number 302363 and was paid by the defendant in quarterly installments of \$13,533.97 on March 1, 1930, June 14, 1930, September 15, 1930 and December 15, 1930.

VI.

That thereafter and on or about August 2, 1930, the defendant, Douglas Fairbanks, duly filed and submitted to the said Collector of Internal Revenue a claim for refund which was not accepted as such, but as additional information to be attached to defendant's income tax return for the calendar year 1928.

VII.

That thereafter an audit was made of the defendant's said 1929 return under the direction of the Commissioner of Internal Revenue. As a result thereof the Commissioner of Internal Revenue determined that the defendant was entitled to a refund for the calendar year 1929.

VIII.

As a result of the determination mentioned above, a Certificate of Overassessment numbered 1256718, was duly scheduled by the Commissioner of Internal Revenue

on Overassessment Schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in the amount of \$677.57 as tax and \$42.99 as interest, which said amounts were erroneously determined to be refundable as an overpayment of defendant's 1929 tax.

IX.

That it was subsequently determined by the Commissioner of Internal Revenue that the amount received from The Elton Corporation by the defendant, Douglas Fairbanks, during the calendar year 1929, constituted income to him under the decision of the United States Board of Tax Appeals in the case of John H. Watson, Jr., v. Commissioner, 27 B. T. A. 463, and not capital gain.

X.

That through mistake and error as to the applicable taxing statute, the United States Commissioner of Internal Revenue mistakenly and erroneously allowed the said amount of \$677.57 of said 1929 taxes, together with interest thereon in the sum of \$42.99 as an overassessment of defendant's tax for the taxable year 1929 and said sums were on January 26, 1932, erroneously refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury, numbered 725,950, in payment, among others, of said refund.

XI.

That the Commissioner of Internal Revenue was mistaken as to the taxing statute applicable to the item of \$150,000.00 received by the defendant, Douglas Fairbanks, from the Elton Corporation during the calendar year 1929. That by virtue of the mistaken and erroneous action of the said Commissioner of Internal Revenue in

refunding a portion of the defendant's 1929 tax, as set forth above, the said sum of \$677.57 and interest thereon in the amount of \$42.99 was mistakenly, erroneously and unlawfully paid out of the Treasury of the United States to the defendant and received by him, when said sums were not due and did not belong to the said Douglas Fairbanks. That the defendant had not paid the total tax due from him for the year 1929 when the refund was made.

XII.

That under the provisions of Section 610(b) of the Revenue Act of 1928, approved May 29, 1928 (45 Stat. 791-875) plaintiff is entitled to maintain this action for the recovery of the money so mistakenly, erroneously and illegally paid and refunded to the defendant, Douglas Fairbanks, together with interest thereon. That under said Section of the Revenue Act, plaintiff is further entitled to recover an additional amount of \$7,322.10, together with interest thereon from the 15th day of March, 1930, from defendant.

XIII.

That defendant, though liable to repay said sum of \$677.57 with interest thereon in the amount of \$42.99, and though requested to do so, has failed, neglected and refused and still fails, neglects and refuses to repay or pay the said sums, or any part thereof to the plaintiff. That none of said sums or any part thereof have been repaid or paid to the plaintiff by the defendant, or by any persons or persons acting for or on behalf of the defendant. That there now remains due and wholly unpaid from the defendant, Douglas Fairbanks, to the plaintiff, United States of America, the sum of \$677.57, with interest thereon in the amount of \$42.99, on account of the refund so made on or about the 26th day of January, 1932.

WHEREFORE, Plaintiff prays judgment against the defendant as follows:

1. For the sum of \$63,026.60 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;
2. For the sum of \$8,439.78 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;
3. For the sum of \$720.56 with interest thereon from January 26, 1932, to date of judgment at the rate of six per cent (6%) per annum;
4. For plaintiff's costs and disbursements in this action expended.

Peirson M. Hall

E. H.

PEIRSON M. HALL

United States Attorney

Alva C. Baird

E. H.

ALVA C. BAIRD

Assistant U. S. Attorney

Jack L. Powell

E. H.

JACK L. POWELL

Assistant U. S. Attorney

Eugene Harpole

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

Attorneys for Plaintiff.

[Endorsed]: Received copy of the within Amended Comp. this 11 day of May 1934 Mott, Vallee & Grant by Paul Vallee Attorney for Deft. Filed May 23, 1934 R. S. Zimmerman Clerk By L. Wayne Thomas Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ANSWER

Defendant, Douglas Fairbanks, by his attorneys, MOTT, VALLEE & GRANT, answering amended complaint of plaintiff, respectfully alleges:

ANSWERING PLAINTIFF'S FIRST CAUSE OF ACTION:

FIRST: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph III of the first cause of action of plaintiff's complaint.

SECOND: Defendant denies each and every allegation of Paragraph V of the first cause of action of plaintiff's complaint, except that defendant admits that in his income tax return for the calendar year 1927, the defendant Douglas Fairbanks reported a net income of \$50,817.31 and a capital net gain of \$1,600,000. and defendant further admits the said return disclosed a tax return due thereon of \$205,113.99, which was duly assessed and paid by defendant in quarterly installments of \$51,278.50 each on March 12, 1928, June 14, 928, September 13, 1928, and December 14, 1928.

THIRD: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph VII of the first cause of action of plaintiff's complaint, except that defendant admits that defendant was entitled to a reduction in his capital net gain return for the year 1927 in the amount of \$438,578.21.

FOURTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations

contained in Paragraph VIII of the first cause of action of plaintiff's complaint, except that defendant admits that the Commissioner of Internal Revenue determined an overassessment in the defendant's 1927 income tax liability in the amount of \$53,231.55, with interest thereon of \$9795.05.

FIFTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph IX of the first cause of action of plaintiff's complaint.

SIXTH: Defendant denies each and every allegation of Paragraph X of the first cause of action of plaintiff's complaint, except that defendant admits that the claim for refund of \$53,231.55 of the sum paid by the defendant as a tax upon his reported net income and capital gains for the calendar year 1927 was allowed by the United States Commissioner of Internal Revenue, and that said amount of \$53,231.55 of said 1927 taxes, together with interest thereon in the sum of \$9795.05 was refunded to the defendant.

SEVENTH: Defendant denies each and every allegation of Paragraphs XI and XII of the first cause of action of plaintiff's complaint.

EIGHTH: Defendant denies each and every allegation of paragraph XIII of the first cause of action of plaintiff's complaint, except that defendant admits that neither the sum of \$53,231.55 with interest thereon in the amount of \$9795.05, nor the sum of \$91,160.64 with interest thereon has been repaid or paid to the plaintiff by the defendant or by any person or persons acting for or on behalf of the defendant.

ANSWERING PLAINTIFF'S SECOND CAUSE OF ACTION:

FIRST: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph III of the second cause of action of plaintiff's complaint.

SECOND: Defendant denies each and every allegation of Paragraph V of the second cause of action of plaintiff's complaint, except that defendant admits that in his income tax return for the calendar year 1928, the defendant Douglas Fairbanks reported a net income of \$69,024.72, and a capital net gain of \$150,000.00 and defendant further admits the said return disclosed a tax return due thereon of \$28,878.66 which was duly assessed and paid by the defendant in quarterly installments of \$7,219.67 or \$7,219.66 each on March 12, 1929, June 14, 1929, September 13, 1929 and December 14, 1929.

THIRD: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph VII of the second cause of action of plaintiff's complaint, except that defendant admits that defendant was entitled to a reduction in his capital net gain return for the year 1928 in the amount of \$41,116.71.

FOURTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph VIII of the second cause of action of plaintiff's complaint, except that defendant admits that the Commissioner of Internal Revenue determined an overassessment in the defendant's 1928 income tax liability in the amount of \$7,507.38, with interest thereon of \$932.40.

FIFTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph IX of the second cause of action of plaintiff's complaint.

SIXTH: Defendant denies each and every allegation of Paragraph X of the second cause of action of plaintiff's complaint, except that defendant admits that the claim for refund of \$7,507.38 of the sum paid by the defendant as a tax upon his reported net income and capital gains for the calendar year 1928 was allowed by the United States Commissioner, and that said amount of \$7,507.38 of said 1928 taxes, together with interest thereon in the sum of \$932.40 was refunded to the defendant.

SEVENTH: Defendant denies each and every allegation of Paragraphs XI and XII of the second cause of action of plaintiff's complaint.

EIGHTH: Defendant denies each and every allegation of Paragraph XII of the second cause of action of plaintiff's complaint, except that defendant admits that neither the sum of \$7,507.38 with interest thereon in the amount of \$932.40, nor the sum of \$5,257.43, with interest thereon has been repaid or paid to the plaintiff by the defendant or by any person or persons acting for or on behalf of the defendant.

ANSWERING PLAINTIFF'S THIRD CAUSE OF ACTION.

FIRST: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph III of the third cause of action of plaintiff's complaint.

SECOND: Defendant denies each and every allegation of Paragraph V of the third cause of action of plaintiff's complaint, except that defendant admits that in his income tax return for the calendar year 1929, the defendant Douglas Fairbanks reported a net income of \$26,204.28, and a capital net gain of \$150,000.00 and defendant further admits the said return disclosed a tax return due thereon of \$54,135.85 which was duly assessed and paid by the defendant in quarterly installments of \$13,533.97 each on March 1st, 1930, June 14, 1930, September 15, 1930 and December 15, 1930.

THIRD: Defendant denies any information or belief sufficient to form a belief as to the allegations of paragraph VI of the third cause of action of plaintiff's complaint except that defendant admits that he duly appeared and submitted to the said Collector of Internal Revenue a claim for refund.

FOURTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph VII of the third cause of action of plaintiff's complaint, except that defendant admits that defendant was entitled to a reduction in his capital net gain return for the year 1929.

FIFTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph VIII of the third cause of action of plaintiff's complaint, except that defendant admits that the Commissioner of Internal Revenue determined an over-assessment in the defendant's 1929 income tax liability in the amount of \$677.57, with interest thereon of \$42.99.

SIXTH: Defendant denies any knowledge or information sufficient to form a belief as to the allegations of Paragraph IX of the third cause of action of plaintiff's complaint.

SEVENTH: Defendant denies each and every allegation of Paragraph X of the third cause of action of plaintiff's complaint, except that defendant admits that the claim for refund of \$677.57 of the sum paid by the defendant as a tax upon his reported net income and capital gains for the calendar year 1929 was allowed by the United States Commissioner of Internal Revenue, and that said amount of \$677.57 of the said 1929 taxes, together with interest thereon in the sum of \$42.99 was refunded to the defendant.

EIGHTH: Defendant denies each and every allegation of paragraphs XI and XII of the third cause of action of plaintiff's complaint.

NINTH: Defendant denies each and every allegation of Paragraph XIII of the third cause of action of plaintiff's complaint, except that defendant admits that neither the sum of \$677.57 with interest thereon in the amount of \$42.99, nor the sum of \$7,322.10 with interest thereon has been repaid or paid to the plaintiff by the defendant or by any person or persons acting for or on behalf of the defendant.

MOTT, VALLEE & GRANT,

by Paul Vallee,

Attorneys for Defendant,

1215 Citizens National Bank Building,
Los Angeles, California.

STATE OF CALIFORNIA }
County of Los Angeles } ss.

CLARENCE E. ERICKSEN being by me first duly sworn, deposes and says: that he is the manager of the business affairs of the defendant Douglas Fairbanks, and as such, the facts herein stated are within his knowledge; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this verification for and on behalf of the defendant, Douglas Fairbanks, for the reason that the defendant, Douglas Fairbanks, is now without the United States of America.

C. E. Ericksen

Subscribed and sworn to before me this 29th day of June, 1934.

[Seal]

Oraetta G. Ehlers

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Received copy of the within Answer this 29th day of June, 1934 Eugene Harpole Special Attorney for plaintiff. Filed Jun. 29, 1934. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION FOR JUDGMENT

Comes now the defendant in the above entitled action, through his attorneys, DENNIS F. O'BRIEN, ARTHUR F. DRISCOLL, PAUL VALLEE and JOHN B. MILLIKEN, and moves the Court for judgment in his behalf.

Defendant bases his said motion upon the ground and for the reason that the evidence before the Court will sustain no other conclusion than judgment for defendant on each of the causes of action presented.

DATED: September 5, 1936.

Dennis F. O'Brien

Dennis F. O'Brien

Arthur F. Driscoll

Arthur F. Driscoll

Paul Vallee

Paul Vallee

John B. Milliken

John B. Milliken

ATTORNEYS FOR DEFENDANT.

[Endorsed]: Filed Sep. 5, 1936. R. S. Zimmerman,
Clerk. By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

OPINION AND ORDER.

The United States sues to recover a large amount of money from defendant, alleged to be due in part to the improper refunding of income tax amounts for the years 1927, 1928 and 1929, and in the main because of the assessment of an insufficient total amount in the first instance. In other words, the suit seeks recovery of tax amounts in excess of those assessed before the claim for refund was made and allowed. The case presents but one point for decision, and that is as to the proper construction to be given to the provisions of the Revenue Statute which permit the taxpayer to have capital net gain used as the basis for assessment after ordinary net income is calculated. Section 101 of the Revenue Act of 1928 (similar provisions were incorporated in the Act of 1926 applicable to the year 1927) provides: "101. In the case of any taxpayer other than a corporation, who for any taxable year derives a capital net gain (as hereafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall be first computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain." Subdivision (c) (1) defines capital net gain to be, "taxable gain from the sale or exchange of capital

asset's consummated after December 31, 1921," and capital assets is defined (subdivision (c) subsection (8), as: "Property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business."

The taxpayer in this case had reported for the respective years mentioned capital net gain, and his assessments had been calculated under the above provisions of the law. He took no account of cost, and later a readjustment was made and he was allowed a refund in a large total amount. The United States by this suit asserts that the method of computation by the capital gain formula was wholly erroneous, and that instead of there having been any rebatable credit, the taxpayer in fact should have paid a larger amount than that first assessed.

The facts are undisputed. In the year 1925 the defendant, a motion picture actor and producer, sold his rights in eight motion pictures produced by him to Elton Corporation for a consideration of \$4,000,000.00. He at the time received as consideration debentures of the corporation for the face amount, plus 990 shares of no par value stock of the same corporation. The cost value of the pictures was ascertained to be \$1,096,445.52. The bonds of the Elton Corporation were to mature over a term of

years, and were callable at the option of the issuing corporation. Bonds were called during the year 1927 in the amount of \$1,600,000.00, and the taxpayer received cash therefor. Other amounts were returned by the Elton Corporation in 1928 and 1929 on the same account.

The Commissioner had ruled during years prior to 1929 and under the provisions of the law, the construction of which is here in question, that when an obligation held in favor of the taxpayer, such as bonds, matured and was paid, the transaction constituted neither a sale nor exchange of capital assets. In February, 1929, the Board of Tax Appeals had before it the case of Werner (15 B. T. A. 482). Werner had held certain 20-year convertible bonds of a corporation which he purchased in 1920 for \$8,870.00. In May, 1923, the issuing corporation called the bonds for redemption and Werner received \$11,000.00 cash. He reported a profit of \$2,130.00 in his income tax return for the year 1923 as "capital gain" and accounted for the same claiming the right to have the tax upon the gain computed at $12\frac{1}{2}\%$ as was provided by the applicable statute. The Commissioner denied his claim and the Board of Tax Appeals, by Chairman Littleton, reversed the Commissioner's ruling, saying:

"We are of opinion that the redemption of these bonds constituted a 'sale or exchange' within the meaning of Section 206. Apparently no attempt was made to limit the character of transactions to which Section 206 should apply."

Following that decision the Commissioner revised his computing rule to correspond with the holding, and announced a new one. In his revised regulations he provided that net gain from bonds "whether received as the result of the maturity of the bonds or as a result of their redemption before maturity, may, in the option of the taxpayer * * *, be taxed under the provisions of Section 206 * * *."

The same question was presented to the Board of Tax Appeals in December, 1932. Commissioner Van Fossan wrote the opinion, which completely reversed the conclusion announced in the Werner case. The case was that of John H. Watson, Jr., reported in 27 B. T. A. 463. The Board there said:

"On further consideration we are of the opinion that the Board erred in its holding in Henry P. Werner, supra. It is elemental that where a statute is clear and unambiguous in its terms and provisions resort should not be had to legislative history to determine the limits of its compass. The statute in question is so simple in construction and so clear in meaning that it justifies no resort to the Congressional Committee's reports as an aid in the interpretation thereof.

The words 'sale or exchange' are ordinary words of well established meaning. Taken in their context they are susceptible of no misconstruction. Payment of the amount specified in the bonds, either at maturity or pursuant to an authorized call prior to maturity, is not a 'sale or ex-

change' of such bonds. It is merely the payment of an obligation according to its fixed terms. For these reasons we believe the decision in Henry P. Werner, supra, was erroneous, and it is accordingly overruled.

In the instant case there was neither a 'sale' nor an 'exchange' of a capital asset when the Liberty Bonds were paid at maturity. It was the satisfaction of an obligation of the United States by payment. Loss incurred or gain realized in such a transaction is not a capital loss or a capital gain under the definition found in the statute."

This ruling was later reaffirmed in the matter of Braun, Trustee, 29 B. T. A. 1161, February 23, 1934.

A thorough study of the question submitted, and notwithstanding the very able argument of counsel for defendant as contained in the briefs filed, has led me to the conclusion that the position of the Revenue Department should be upheld. The reasoning of the Board of Tax Appeals as expressed in the Watson case, supra, seems logical and consistent with the plain meaning of the applicable law.

Findings and Judgment will be for the plaintiff, and an exception is noted in favor of the defendant.

Dated March 18, 1936.

Wm. P. James

U. S. District Judge.

[Endorsed]: Filed Mar. 18, 1936. R. S. Zimmerman,
Clerk. By Murray E. Wire, Deputy Clerk.

At a stated term, to-wit: The February Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 5th day of September, in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable WM. P. JAMES, District Judge.

United States of America, (Plaintiff,)
vs. (No. 6680-J Law.
Douglas Fairbanks,)
Defendant. (

This cause coming before the court for hearing motion of defendant to set aside and vacate opinion, judgment and stipulation; and to grant new trial and restore case to calendar, filed July 9, 1936; Alva C. Baird, Assistant U. S. Attorney, appearing as counsel for the government, John B. Milliken, Esq. appearing for the defendant, and A. M. Randol being present as the official stenographic reporter of the proceedings:

J. B. Milliken, Esq. argues in support of said Motion and argues the matter of the interest to be allowed on the refund:

A. C. Baird, Esq. states that the complaint or answer does not allege the date of the demand for refund, and states objections to the granting of the defendant's said motion.

The Court orders the judgment heretofore entered herein, vacated. Exception is allowed to the plaintiff to this order.

J. B. Milliken, Esq. reoffers the entire testimony heretofore taken at the trial of this case, together with all exhibits received in evidence;

A. C. Baird, Esq. states he has no objection if the entire record is considered;

J. B. Milliken, Esq. states that it is so understood;

The Court so orders;

A. C. Baird, Esq. thereupon offers as plaintiff's exhibit, the following, and the court orders same admitted in evidence, being marked

Plf's. Exhibit 13: letter dated July 6, 1933, John P. Carter, Collector of Int. Rev. to Douglas Fairbanks.

J. B. Milliken, Esq. now moves for judgment on behalf of defendant and files said motion in writing;

A. C. Baird, Esq. now renews motion for judgment in this case for plaintiff;

J. B. Milliken, Esq. offers Special Findings of Fact, being 36 in number;

A. C. Baird, Esq. states separately plaintiff's objections to proposed findings of defendant which are submitted in writing, and the Court separately orders each of said objections overruled, and an exception is allowed and noted as to each of said orders:

J. B. Milliken, Esq. presents proposed Special Conclusions of Law in writing and same are filed herein:

A. C. Baird, Esq. offers Conclusions of law on behalf of plaintiff, and same are filed herein;

J. B. Milliken, Esq. presents to the Court copy of opinion of case U. S. vs. Carpenter, decided by U. S. Circuit Court of Appeals, 10th Circuit, July 11, 1936, and same is filed herein;

J. B. Milliken, Esq. argues further on the matter of the allowance to plaintiff of interest on the refund, and contends that plaintiff should not be allowed interest, but that if any interest is allowed, it should be from the date of demand of plaintiff;

A. C. Baird, Esq. argues further the matter of the allowance of interest on the refund, and asks time to file brief thereon; and moves for judgment for the plaintiff;

The Court thereupon allows the Special Findings of Fact and signs same, which are now filed herein. The Motion on behalf of defendant for judgment is ordered denied. Exception allowed. The Conclusions of Law offered on the part of the defendant are ordered refused. Exception allowed. The judgment is ordered in favor of the plaintiff, except the Court will consider further the matter of interest before the judgment is entered;

The plaintiff is allowed ten days to file brief on the matter of the allowance to plaintiff of interest on the judgment to be entered, and the defendant is allowed ten days to file reply brief;

A. C. Baird, Esq. moves that the opinion of the court heretofore filed herein, be made to conform to the case as now submitted, and the Court so orders, except as to the matter of interest, and states that if the Court decides differently same will be so amended.

[TITLE OF COURT AND CAUSE.]

SPECIAL FINDINGS OF FACT

This cause came on regularly for trial on the 5th day of September, 1936, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the parties hereto; plaintiff appearing by ALVA C. BAIRD, Assistant United States Attorney for said district, and the defendant appearing by his counsel, DENNIS F. O'BRIEN, ARTHUR F. DRISCOLL, PAUL VALLEE and JOHN B. MILLIKEN; and evidence, both oral and documentary, having been received and the Court having fully considered the same, makes the following Special Findings of Fact:

I.

The plaintiff is a corporation sovereign and politic.

II.

The defendant Douglas Fairbanks is a citizen of the United States and a resident of Hollywood, County of Los Angeles, State of California, within the jurisdiction of this court.

III.

This is a suit at law by the United States of a civil nature arising in connection with the administration of the law of Congress providing for Internal Revenue, and this action is commenced and maintained at the request and authorization of the Commissioner of Internal Revenue, and under the direction of the Attorney General of the United States.

IV.

Defendant has been engaged in the business of making motion pictures at all times since the year 1916.

V.

In 1925 defendant was the owner of eight completed motion pictures in addition to one in the process of making.

VI.

Under date of March 5, 1925 defendant made a contract with The Elton Corporation under the terms of which he transferred to The Elton Corporation all his right, title and interest in said motion pictures in exchange for \$4,000,000 par value debenture bonds and 990 shares of no par value stock of said corporation, said bonds being dated March 5, 1925 and maturing March 5, 1935. The cost basis to the defendant for income tax purposes of the pictures and other assets exchanged by defendant for bonds of The Elton Corporation of the face value of \$4,000,000 was \$1,096,445.52.

VII.

The aforesaid debenture bonds issued by The Elton Corporation contained the following provision:

"This debenture bond may be redeemed by the corporation at any time at its face value plus interest earned and unpaid hereon upon thirty days' notice to the registered holder hereof."

Said contract with The Elton Corporation dated March 5, 1925 contained a provision under which The Elton Corporation obligated itself to redeem \$100,000 face value of said bonds per year beginning three years after date of said contract, or after March 5, 1928.

VIII.

In 1927 said Elton Corporation did redeem and said defendant did surrender for redemption \$1,600,000 par value of said debenture bonds.

IX.

In the year 1928 the said Elton Corporation redeemed and defendant surrendered for redemption \$150,000 par value of said debenture bonds.

X.

In the year 1929 the said Elton Corporation did redeem and defendant did surrender for redemption \$150,000 par value of said debenture bonds.

XI.

At all times during said years there was pending between the plaintiff and defendant a controversy as to defendant's income taxes for the years 1917 to 1925 inclusive, during which years defendant had kept his books on a cash receipts and disbursements basis, and had expensed the cost of his motion pictures as made. Defendant contended in said controversy that under the laws in existence he was entitled so to do, and the plaintiff contended that the cost of said motion pictures should have been capitalized and amortized over a period of years.

XII.

During the pendency of said controversy, the defendant Douglas Fairbanks on or about March 14, 1928 filed with the Collector of Internal Revenue for the Sixth Internal Revenue District, California, an income tax return for the calendar year 1927 upon form 1040, commonly known as individual income tax return. Said return was prepared and filed under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes", approved February 26, 1926 (44 Stat. 9), and pursuant to the regulations duly promulgated under said Act by the Commiss-

sioner of Internal Revenue with the approval of the Secretary of the Treasury.

XIII.

Said return was prepared and filed upon a cash receipts and disbursements basis.

XIV.

In his said income tax return for the calendar year 1927 the defendant Douglas Fairbanks reported a net income of \$50,817.31, and a capital net gain of \$1,600,000 received from The Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the calendar year 1927 as set forth in finding VIII above.

XV.

In said tax return for the year 1927 defendant took no deduction for cost against the said capital net gain of \$1,600,000 and the entire amount so received by him from The Elton Corporation during 1927 was returned for taxation at the capital gain rate of 12½% and said return disclosed a tax due thereon in the amount of \$205,-113.99, which was assessed by the United States Commissioner of Internal Revenue on his 1928 Serial or Account Number 30-130 Assessment List and was paid by the defendant in quarterly instalments of \$51,278.50 each on March 12, 1928, June 14, 1928, September 13, 1928 and December 14, 1928.

XVI.

During the pendency of said controversy between the plaintiff and defendant as to defendant's income taxes for the years 1917 to 1926 inclusive, and on or about March 12, 1929 the defendant Douglas Fairbanks filed

with the Collector of Internal Revenue for the Sixth Internal Revenue District, California, an income tax return for the calendar year 1928 upon form 1040, commonly known as an individual income tax return. Defendant also filed an amended income tax return upon form 1040 on July 12, 1929 for said calendar year. Said return and amended return were prepared and filed under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes", approved May 29, 1928 (45 Stat. 791-875), and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. Said return and amended return were prepared and filed on a cash receipts and disbursements basis.

XVII.

In said tax return for the calendar year 1928 defendant Douglas Fairbanks reported a net income of \$69,024.72 and a capital net gain of \$150,000 received from The Elton Corporation in redemption and retirement of that amount of its corporate bonds at par value during the year 1928, as set forth in finding IX above.

XVIII.

In said tax return for the calendar year of 1928 defendant took no deduction for cost against said capital net gain, and the entire amount so received by him from The Elton Corporation during the year 1928 was returned for taxation at the capital gain rate of $12\frac{1}{2}\%$, and said original tax return disclosed a tax due thereon in the amount of \$28,878.66 which was assessed by the United

States Commissioner of Internal Revenue on his 1929 assessment list, Serial or Account Number 303283, and was paid by the defendant in quarterly installments of \$7,219.67 or \$7,219.66 each on March 12, 1929, June 14, 1929, September 13, 1929 and December 14, 1929.

XIX.

In December 1929 a written agreement of settlement was made between plaintiff and defendant as to defendant's income taxes for the years 1917 to 1919 inclusive, and a separate written agreement of settlement was made between defendant and plaintiff as to defendant's income taxes for the years 1920 to 1926 inclusive.

XX.

As part of said settlements, defendant's income taxes for the years 1917 to 1926 inclusive were recomputed by the plaintiff. In the said recomputation the cost of defendant's motion pictures made during the said years of 1917 to 1926 inclusive were capitalized in the years that the expenditures were made and were amortized upon a formula agreed upon between the plaintiff and the defendant, namely, a deduction of 75% thereof in the first year after release of the motion picture; 15% during the second year after release; 5% during the third year after release, and 5% during the fourth year after release.

XXI.

As a result of said recomputation, defendant was required to pay and did pay to the plaintiff additional taxes for the years 1917 to 1926 inclusive in the sum of \$488,079.32, with interest amounting to \$207,761.21, or a total additional payment of \$695,840.53, leaving an unrecouped or unamortized cost of pictures of \$1,096,445.52 as of December 31, 1926.

XXII.

After the aforesaid settlement had been arrived at between the plaintiff and the defendant as to defendant's income taxes for the years 1917 to 1926 inclusive, but before plaintiff had definitely ascertained the amount of the unrecouped picture costs as of December 31, 1926, the defendant Douglas Fairbanks on or about March 14, 1930 filed with the Collector of Internal Revenue for the Sixth Internal Revenue District of California an income tax return for the calendar year 1929 upon form 1040, commonly known as an individual income tax return. In making said return, the defendant took the basis of capitalization and amortization upon which settlement had been made between the defendant and plaintiff, and estimated the unamortized cost of pictures as of December 31, 1926 to be \$928,630.87, and defendant took as cost against the amount received from The Elton Corporation in the redemption of debentures during the said calendar year that part of said sum of \$928,630.87 which the total received, or \$150,000, bore to the total issue of debentures, or \$4,000,000., or a cost of \$34,823.65. The balance of the \$150,000 received during the said calendar year of 1929 was reported as capital net gain. The said return was prepared and filed under the provisions of the Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue and for other purposes", approved May 29, 1928 (45 Stat. 791-875), and pursuant to the regulations duly promulgated under said Act by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

XXIII.

The said income tax return filed by Douglas Fairbanks for the calendar year 1929 reported a net income of \$26,-

204.28, in addition to the aforesaid capital net gain of \$150,000, from which costs in the amount of \$34,823.65 were deducted as hereinabove stated, leaving a balance of \$115,176.35 for taxation at the capital gain rate of 12½% for the year 1929, and said income tax return disclosed a tax due thereon in the amount of \$54,135.85, which was duly assessed by the United States Commissioner of Internal Revenue on his 1930 Assessment List, Serial or Account Number 302363 and was paid by the defendant in quarterly instalments of \$13,533.97 on March 1, 1930, June 14, 1930, September 15, 1930 and December 15, 1930.

XXIV.

Thereafter under date of August 7, 1930, one L. E. Fellers, revenue agent in the employ of the plaintiff, made a report of audit upon defendant's returns for the years 1927 to 1929 inclusive, and therein it was disclosed that the plaintiff had fixed the unamortized cost of the pictures as of December 31, 1926 at \$1,096,445.52 instead of \$928,630.87, as estimated and used by the defendant in his 1929 return above mentioned.

XXV

Said report of audit made by L. E. Fellers under date of August 7, 1930 treated the proceeds of the debentures of The Elton Corporation which defendant had reported for the years 1927, 1928 and 1929 as capital net gain in the same manner as the defendant had treated them in the returns filed.

XXVI.

Thereafter upon the basis of the unamortized cost of pictures as of December 31, 1926 of \$1,096,445.52, as fixed by plaintiff, and treating the proceeds of said deben-

tures as capital gain as was done in the Fellers' Audit, defendant caused to be prepared and filed claims for refunds for each of the years 1927, 1928 and 1929.

XXVII.

On or about August 29, 1930 the defendant Douglas Fairbanks duly filed and submitted to the said Collector of Internal Revenue a claim and application for refund of \$53,231.55 of the sum paid by him as income taxes for the taxable year 1927 and in said claim alleged as ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts and Disbursements basis and Income Tax returns filed accordingly.

"At conferences with a Special Conference Committee held during March 1929, Washington, D. C. it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year and 5% the fourth year.

"On March 5th, 1925 I exchanged my interests in various completed motion pictures and other assets for \$4,000,000.00 par value debenture bonds, payable over a period of ten years and 990 shares of no par value stock of The Elton Corporation. The value of the pictures and other assets exchanged was established in my agreement with the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7, 1930 at \$1,096,445.52.

"On April 5th, 1927, and subsequently thereto, during the year 1927, The Elton Corporation cal'ed and paid me for \$1,600,000. par value debenture bonds. Inasmuch as

my income tax returns have been filed on a Cash Receipts and Disbursements basis and consequently the entire cost of pictures deducted from my income within the years expended, I treated the entire \$1,600,000. as capital net gain and so reported same on my 1927 income tax return and paid tax on same accordingly.

"Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927, as stated above, and the value of the bonds and other assets established at \$1,-096,445.52, I should be permitted to treat the percentage of \$1,096,445.52 that \$1,600,000. is to \$4,000,000. as cost of said bonds redeemed. Since \$1,600,000. is 40% of \$4,000,000. and 40% of \$1,096,445.52 is \$438,578.21, there remains \$1,161,421.79 capital net gain instead of \$1,-600,000. as originally reported.

"The tax on this capital net gain is to be offset by the disallowance of deductions claimed against ordinary income in the amount of \$8,271.97 as reflected in Revenue Agent L. E. Fellers' report dated August 7, 1930, leaving a net overpayment of \$53,231.55.

"Refund of interest on the overpayment is also claimed under provision of Section #614, Revenue Act of 1928."

XXVIII.

The aforesaid claim for refund was based upon the figure of \$1,096,445.52 fixed by the plaintiff as the unamortized cost of motion pictures as of March 1, 1925, and defendant charged against the proceeds of debentures received during 1927 totaling \$1,600,000. such part of the unamortized cost of \$1,096,445.52 as \$1,600,000. bore to \$4,000,000, the total par value of debentures received by defendant.

XXIX.

On or about August 29, 1930 the defendant Douglas Fairbanks duly filed and submitted to said Collector of Internal Revenue a claim and application for refund of \$7,507.38 of the sum paid by him as income taxes for the taxable year 1928, and in said claim alleged as a ground for recovery thereunder as follows:

"My accounts have been kept on a Cash Receipts and Disbursements basis and Income Tax returns filed accordingly.

"At conference with a Special Conference Committee held during March, 1929 in Washington, D. C., it was agreed that picture costs should be capitalized and amortized on the basis of 75% the first year from release date, 15% the second year, 5% the third year and 5% the fourth year.

"On March 5th, 1925, I exchanged my interests in various completed motion pictures and other assets for \$4,000,000. par value debenture bonds, payable over a period of ten years and 990 shares of no par value stock of The Elton Corporation. The value of the pictures and assets exchanged was established in my agreement with the Special Conference Committee and subsequently confirmed by the Commissioner and Internal Revenue Agent, L. E. Fellers, in his report of August 7, 1930, at \$1,-096,445.52.

"During the year 1928, The Elton Corporation called and paid me for \$150,000.00 par value debenture bonds. Inasmuch as my income tax returns have been filed on a Cash Receipts and Disbursements basis and consequently the entire cost of pictures deducted from my income within the years expended, I treated the entire \$150,000.00 as

capital net gain and so reported same on my 1928 income tax return and paid tax on same accordingly.

"Since my method of accounting was changed by the Bureau of Internal Revenue in final settlement of my income tax for years prior to 1927 and the value of the bonds and other assets established at \$1,096,445.52, I should be permitted to treat the percentage of \$1,096,445.52 that \$150,000. is to \$4,000,000. as cost of said bonds redeemed. Since \$150,000. is 3.75% of \$4,000,000. and 3.75% of \$1,096,445.52 is \$41,116.71, there remains \$108,883.29 capital net gain instead of \$150,000.00 as originally reported.

"In addition to this decrease in capital net gain, additional deductions are claimed against ordinary net income in the net amount of \$11,136.55 as reflected in Revenue Agent L. E. Fellers' report dated August 7, 1930. Of this amount \$10,747.49 is deduction from ordinary net income as reflected in my amended return. This leaves a net overpayment for 1928 of \$7,507.38.

"Refund of interest on the overpayment is also claimed under provisions section #614, Revenue Act of 1928."

XXX.

The aforesaid claim for refund was based upon the figure of \$1,096,445.52 fixed by plaintiff as the unamortized cost of motion pictures as of March 1, 1925, and defendant charged against the proceeds of debentures received during 1928 amounting to \$150,000 such part of the unamortized cost of \$1,096,445.52 as \$150,000 bore to \$4,000,000 the total par value of debentures received by defendant.

XXXI.

On or about August 2, 1930 the defendant Douglas Fairbanks duly filed and submitted to the said Collector of Internal Revenue a claim for refund against his 1929 tax which was not accepted as such, but as additional information to be attached to defendant's income tax return for the year 1929.

XXXII.

The aforesaid claim for refund was based upon the figure of \$1,096,445.52 found by the plaintiff to be the unamortized cost of motion pictures as of March 1, 1925 and defendant charged against the proceeds of debentures received by him during 1929 amounting to \$150,000, such part of the unamortized cost of \$1,096,445.52 as that figure, namely, \$150,000 bore to the total par value of debentures amounting to \$4,000,000 received by defendant.

XXXIII.

Thereafter an audit was made of defendant's said returns for 1927, 1928 and 1929 in connection with the said claims for refund under the direction of the Commissioner of Internal Revenue. As a result thereof, the Commissioner of Internal Revenue determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1927 in the amount of \$438,578.21, being the proportionable amount of cost attributable to the capital gain so reported with a corresponding reduction in his capital gain tax returned and a reduction in his total tax liability. As a result thereof, the Commissioner of Internal Revenue also determined that the defendant was entitled to a reduction in his capital net gain returned for the year 1928 in the amount of \$41,116.71, being the proportionable amount of cost attributable to the capital gain

so reported with a corresponding reduction in his capital gain tax returned and a reduction in his total tax liability. As a result thereof, the Commissioner of Internal Revenue determined also that defendant was entitled to a reduction in his capital net gain returned for the year 1929 with a corresponding reduction in his capital gain tax return and a reduction in his total tax liability.

XXXIV.

As a result of the determination mentioned above, a certificate of overassessment No. 2,155,767 was duly scheduled by the Commissioner of Internal Revenue, on overassessment Schedule No. I. T. 44669, approved January 6, 1932, allowing an overassessment in defendant's 1927 return in the amount of \$53,231.55 as tax and \$9,795.05 as interest, and a certificate of overassessment No. 2,155,721 was duly scheduled by the Commissioner of Internal Revenue on overassessment Schedule No. I. T. 44669, approved January 6, 1932 allowing an overassessment in defendant's 1928 return in the amount of \$7,507.38 as tax and \$932.40 as interest, and a certificate of overassessment No. 1,256,718 was duly scheduled by the Commissioner of Internal Revenue on overassessment schedule No. I. T. 44669 approved January 6, 1932, allowing an overassessment in the amount of \$677.57 as tax, and \$42.99 as interest.

XXXV.

Defendant's claim for refund of \$53,231.55 of the sum paid by him as a tax upon his reported net income and capital gain for the calendar year 1927 was allowed by

the United States Commissioner of Internal Revenue, and said amount of \$53,231.55 of said 1927 taxes, together with interest thereon in the sum of \$9,709.05 were on January 26, 1932, refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury, No. 725,950 in payment among others of said refund, and defendant's claim for refund of \$7,507.38 of the sum paid by him as a tax upon his reported net income and capital gains for the calendar year 1928 was allowed by the United States Commissioner of Internal Revenue, and said amount of \$7,507.38 of said 1928 taxes, together with interest thereon in the sum of \$932.40 were, on January 26, 1932 refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury, No. 725,950 in payment among others of said refund, and the United States Commissioner of Internal Revenue likewise allowed the sum of \$677.56 of defendant's 1929 taxes, together with interest thereon in the sum of \$42.99 as an overassessment of defendant's taxes for the taxable year 1929, and said sums were on January 26, 1932 refunded to the defendant by delivery to him of the check of the Disbursing Clerk of the United States Treasury No. 725,950 in payment among others of said refund.

XXXVI.

That thereafter the Commissioner of Internal Revenue determined that the refunds made as above set forth were erroneous and did, through the Collector of Internal Revenue for the Sixth Collection District of California,

on July 6, 1933 officially demand the return to the Government of the sums paid to defendant on January 26, 1932. No part of said repayments by the government has been returned by the defendant to the Government or by any person or persons acting for or on behalf of defendant.

This cause of action was commenced and maintained at the request and authorization of the Commissioner of Internal Revenue and under the direction of the Attorney General of the United States.

DATED: Sept. 5 - 1936

Wm P James
UNITED STATES DISTRICT JUDGE

DENNIS F. O'BRIEN
ARTHUR F. DRISCOLL
PAUL VALLEE

Citizens Bank Building,
Los Angeles, California

and

JOHN B. MILLIKEN,
Bank of America Building,
Los Angeles, California
COUNSEL FOR DEFENDANT.

[Endorsed]: Filed Sep 5 - 1936 R. S. Zimmerman
Clerk By Murray E. Wire, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 30th day of September in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable Wm. P. James, District Judge.

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.) No. 6680-J.
)
DOUGLAS FAIRBANKS,)
)
 Defendant.)

The judgment heretofore entered in favor of the plaintiff as against the defendant was upon application of the defendant vacated, in order that the Court's determination that interest allowed in favor of the Government recoverable as of the date of the refund of the tax amount could be reconsidered. The Court now, after considering the briefs of counsel, is of the view and so decides that the interest should be calculated as from the date of the demand for the refund of the tax amount, to-wit: from July 6, 1933, and at the legal rate established by the State of California. Judgment is ordered accordingly, and an exception is noted in favor of the United States.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) No. 6680-J
v.)
) JUDGMENT
DOUGLAS FAIRBANKS,)
)
Defendant.)

The above-entitled cause came on regularly for trial on the 5th day of September, 1936, before the Court sitting without a jury, a jury having been expressly waived in writing, the plaintiff appearing by its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, E. H. Mitchell, Special Assistant United States Attorney, and Alva C. Baird, Assistant United States Attorney; the defendant appearing by Paul Vallee, Dennis F. O'Brien, Arthur F. Driscoll, and John B. Milliken, Esqs., and evidence both oral and documentary having been introduced, briefs having been filed, the cause having been submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered against the defendant and in favor of the plaintiff for the sum of \$72,186.94 (Seventy-two thousand one hundred eighty-six and 94/100 Dollars), together with interest thereon at the rate of 7% per annum from July 6, 1933 to and including October 5, 1936, the date of entry of judgment herein, in the sum of \$16,422.51 (Sixteen thousand four hundred twenty-two and 51/100 Dollars), together with costs and disbursements in favor of the plaintiff incurred in said action, as provided by law, and taxed by the Clerk of this Court in the sum of \$16.00.

Dated this 5th day of October, 1936.

Wm. P. James
UNITED STATES DISTRICT JUDGE.

Approved as to form according to Rule 44:

Paul Vallee
Attorneys for Defendant.

Judgment entered and recorded Oct. 5 - 1936

R. S. ZIMMERMAN Clerk
By Murray E. Wire, Deputy Clerk.

P [Endorsed]: Filed Oct. 5, 1936. R. S. Zimmerman
Clerk By Murray E. Wire, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CONCLUSIONS OF LAW
(REQUESTED BY DEFENDANT)

This cause came on regularly for trial on the 5th day of September, 1936, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the parties hereto; plaintiff appearing by ALVA C. BAIRD, Assistant United States Attorney for said district, and the defendant appearing by his counsel, DENNIS F. O'BRIEN, ARTHUR F. DRISCOLL, PAUL VALLEE and JOHN B. MILLIKEN; and evidence, both oral and documentary, having been received and the Court having fully considered the same, makes the following Conclusions of Law and adopts the Conclusions of Law hereinafter indicated:

I.

That the surrender by the defendant of the said bonds of The Elton Corporation for redemption during the year 1927 was an exchange or sale of capital assets within the meaning of Section 208 of the Revenue Act of 1926. That the excess of the sum received by the defendant during the year 1927 upon the redemption of said bonds, over and above the cost basis to defendant of the bonds surrendered, was capital gain within the meaning of Section 208 of the Revenue Act of 1926 and was taxable to defendant at the rates and in the manner provided in said Section.

II.

That defendant overpaid his income taxes for the year 1927 in the amount refunded to him by the Commissioner of Internal Revenue; that all sums refunded to the defendant as overpayments of income taxes for the year 1927 and interest thereon were correctly and legally refunded.

III.

That the plaintiff is not entitled to recover from defendant any of the sums refunded to defendant as overpayments of income taxes for the year 1927 or interest thereon.

IV.

That the surrender by the defendant of the said bonds of The Elton Corporation for redemption during the year 1928 was an exchange or sale of capital assets within the meaning of Section 101 of the Revenue Act of 1928. That the excess of the sum received by the defendant during the year 1928 upon the redemption of said bonds, over and above the cost basis to defendant of the bonds surrendered, was capital gain within the meaning of Section 101 of the Revenue Act of 1928 and was taxable to defendant at the rates and in the manner provided in said Section.

V.

That defendant overpaid his income taxes for the year 1928 in the amount refunded to him by the Commissioner of Internal Revenue; that all sums refunded to the defendant as overpayments of income taxes for the year 1928 and interest thereon, were correctly and legally refunded.

VI.

That the plaintiff is not entitled to recover from defendant any of the sums refunded to defendant as overpayments of income taxes for the year 1928 or interest thereon.

VII.

That the surrender by the defendant of the said bonds of The Elton Corporation for redemption during the year 1929 was an exchange or sale of capital assets within the meaning of Section 101 of the Revenue Act of 1928.

That the excess of the sum received by the defendant during the year 1929 upon the redemption of said bonds, over and above the cost basis to defendant of the bonds surrendered, was capital gain within the meaning of Section 101 of the Revenue Act of 1928 and was taxable to defendant at the rates and in the manner provided in said Section.

VIII.

That defendant overpaid his income taxes for the year 1929 in the amount refunded to him by the Commissioner of Internal Revenue; that all sums refunded to the defendant as overpayments of income taxes for the year 1929 and interest thereon were correctly and legally refunded.

IX.

That the plaintiff is not entitled to recover from defendant any of the sums refunded to defendant as overpayments of income taxes for the year 1929 or interest thereon.

DATED: _____

UNITED STATES DISTRICT JUDGE.

Dennis F. O'Brien

Arthur F. Driscoll

Paul Vallee

Citizens Bank Building,

Los Angeles, California, and

John B. Milliken,

Bank of America Building,

Los Angeles, California

COUNSEL FOR DEFENDANT.

[Endorsed]: Conclusions of Law Proposed by deft.
Filed Sep. 5, 1936 R. S. Zimmerman, Clerk By Murray
E. Wire Deputy Clerk

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, AND TO HONORABLE WILLIAM P. JAMES, JUDGE THEREOF:

Your petitioner, DOUGLAS FAIRBANKS, the defendant in the above entitled cause, feeling himself aggrieved by the judgment rendered herein in favor of the plaintiff and entered on the 5th day of October, 1936, prays that an appeal may be allowed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors, concurrently filed herewith, in order that the errors complained of may be corrected, and petitioner further prays that a citation be issued as provided by law commanding the plaintiff to appear before said Circuit Court of Appeals and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that an order be made fixing the amount of the cost bond which defendant shall give and furnish upon said appeal. Petitioner respectfully petitions that all proceedings in the said District Court of the United States be staid by supersedeas superseding this Honorable Court's judgment aforesaid.

That petitioner herein tenders bond in such amount as this Honorable Court may order for the purposes of this appeal.

Dated this 2nd day of December, 1936.

Dennis F. O'Brien

Dennis F. O'Brien

Arthur F. Driscoll

Arthur F. Driscoll

Paul Vallee

Paul Vallee

Citizens Bank Building

Los Angeles, California.

John B. Milliken

John B. Milliken

Bank of America Building

Los Angeles, California

Attorneys for Defendant.

SERVICE of true copy of the within instrument was duly admitted this 2nd day of December, 1936.

Peirson M. Hall

Peirson M. Hall

United States Attorney.

E. H. Mitchell

E. H. Mitchell

Special Assistant U. S. Attorney

Alva C. Baird

Alva C. Baird

Asst. United States Attorney

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 3, 1936 R. S. Zimmerman,
Clerk By L. B. Figg, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)
)
)
Plaintiff,)
) No. 6680-J
vs.)
) ASSIGNMENT
DOUGLAS FAIRBANKS,) OF ERRORS
)
Defendant.)
)

Comes now the defendant and appellant, DOUGLAS FAIRBANKS, and makes and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this Court entered on the 5th day of October, 1936.

I

The Court erred in rendering and entering its decision and judgment in favor of plaintiff and against the defendant for the reason that said decision and judgment is contrary to the law and is not supported by the facts as found by the Court.

II

The Court erred in denying defendant's motion, both oral and written, for judgment for the reason that upon

the facts as found by the Court, the defendant is entitled to recover judgment as a matter of law.

III

The Court erred in concluding as a matter of law from the facts found by the Court that the redemption by The Elton Corporation in the years 1927, 1928 and 1929 respectively, of its bonds held and owned by the defendant was not an exchange or sale of capital assets within the meaning of section 208 of the Revenue Act of 1926 and/or section 101 of the Revenue Act of 1928.

IV

The Court erred in concluding as a matter of law from the facts found by the Court that the amounts refunded to the defendant by the United States of America as over-payments of income taxes for the years 1927, 1928, and 1929, were erroneously made and that the plaintiff was entitled to recover the full amount sued for herein of \$72,186.94, or any other sum, together with interest.

V

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the surrender by the defendant of the said bonds of The Elton Corporation for redemption during the year 1927 was an exchange or sale of capital assets within the meaning of section 208 of the Revenue Act of 1926, for the reason that such conclusion of law is supported by the facts found by the Court.

VI

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the excess of the sum received by defendant during the

year 1927 upon the redemption of said bonds over and above the cost basis to defendant of the bonds surrendered was capital gain within the meaning of section 208 of the Revenue Act of 1926, and that said gain was taxable to defendant at the rates and in the manner provided in said section for the reason that such conclusion of law is supported by the facts found by the Court.

VII

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the defendant overpaid his income taxes for the year 1927 in the total amount refunded to defendant by the Commissioner of Internal Revenue and that all such sums so refunded to the defendant as overpayment of income taxes for the year 1927, and interest thereon, were correctly and legally refunded for the reason that such conclusion of law is supported by the facts as found by the Court.

VIII

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the United States of America is not entitled to recover from defendant any of the sums refunded to defendant as overpayments of income taxes for the year 1927 or any interest thereon, for the reason that such conclusion of law is supported by the facts as found by the Court.

IX

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the surrender by the defendant of the said bonds by The Elton Corporation for redemption during the year 1928 was an exchange or sale of capital assets within the meaning of section 101 of the Revenue Act of 1928, for the

reason that such conclusion of law is supported by the facts found by the Court.

X

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the excess of the sum received by defendant during the year 1928 upon the redemption of said bonds over and above the cost basis to defendant of the bonds surrendered was capital gain within the meaning of section 101 of the Revenue Act of 1928, and that said gain was taxable to defendant at the rates and in the manner provided in said section, for the reason that such conclusion of law is supported by the facts found by the Court.

XI

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the defendant overpaid his income taxes for the year 1928 in the total amount refunded to defendant by the Commissioner of Internal Revenue and that all such sums so refunded to the defendant as overpayments of income taxes for the year 1928, and interest thereon, were correctly and legally refunded for the reason that such conclusion of law is supported by the facts as found by the Court.

XII

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the United States of America is not entitled to recover from defendant any of the sums refunded to defendant as overpayment of income taxes for the year 1928 and any interest thereon, for the reason that such conclusion of law is supported by the facts as found by the Court.

XIII

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the surrender by the defendant of the said bonds of The Elton Corporation for redemption during the year 1929 was an exchange or sale of capital assets within the meaning of section 101 of the Revenue Act of 1928, for the reason that such conclusion of law is supported by the facts found by the Court.

XIV

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the excess of the sums received by defendant during the year 1929 upon the redemption of said bonds over and above the cost basis to defendant of the bonds surrendered was capital gain within the meaning of section 101 of the Revenue Act of 1928, and that said gain was taxable to defendant at the rates and in the manner provided in said section, for the reason that such conclusion of law is supported by the facts found by the Court.

XV

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the defendant overpaid his income taxes for the year 1929 in the total amount refunded to defendant by the Commissioner of Internal Revenue and that all such sums so refunded to the defendant as overpayments of income taxes for the year 1929, and interest thereon, were correctly and legally refunded for the reason that such conclusion of law is supported by the facts as found by the Court.

XVI

The Court erred in failing and refusing to conclude as a matter of law from the facts found by the Court that the United States of America is not entitled to recover from defendant any of the sums refunded to defendant as overpayments of income taxes for the year 1929, or any interest thereon, for the reason that such conclusion of law is supported by the facts as found by the Court.

XVII

The Court erred in allowing any interest whatsoever to the United States of America on the judgment recovered by it herein for the reason that no interest is due thereon.

XVIII

The Court erred in fixing the rate of interest at the rate of seven per cent (7%) per annum on said judgment so recovered herein by the United States of America in the event it is determined that interest was properly allowable on said judgment.

XIX

The Court erred in failing and refusing to fix the rate of interest on the judgment recovered herein by the United States of America at the rate of six per cent (6%) per annum, in the event it is determined that interest was properly allowable thereon.

XX

The Court erred in failing and refusing to render and enter judgment in favor of defendant for the reason that upon the facts found by the Court the plaintiff is entitled to judgment as a matter of law.

XXI

The Court erred in finding and concluding that the plaintiff is entitled to judgment against the defendant for its costs.

WHEREFORE, defendant prays that said judgment may be reversed and that the Circuit Court of Appeals for the Ninth Circuit render a proper order and judgment on the record, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated this 30 day of November, 1936.

Dennis F. O'Brien

Dennis F. O'Brien

Arthur F. Driscoll

Arthur F. Driscoll

Paul Vallee

Paul Vallee

Citizens Bank Building

Los Angeles, California.

John B. Milliken

John B. Milliken

Bank of America Building

Los Angeles, California.

Attorneys for Defendant.

SERVICE of true copy of the within instrument was duly admitted this 2nd day of December, 1936.

Pearson M. Hall

Pearson M. Hall

United States Attorney,

E. H. Mitchell

E. H. Mitchell

Special Assistant U. S. Attorney

Alva C. Baird

Alva C. Baird

Assistant United States

Attorney

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 3 - 1936 R. S. Zimmerman,
Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING APPEAL AND FIXING
BOND.

IT IS HEREBY ORDERED that the appeal prayed for in the petition filed therefor be and the same is hereby allowed for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision and judgment of the above entitled court referred to in said petition.

IT IS FURTHER ORDERED AND DIRECTED that pending such appeal the said Judgment of October 5th, 1936, referred to in said Petition for Appeal, be wholly superseded and suspended and that the plaintiff, United States of America, be and hereby is restrained and enjoined from collecting or attempting to collect on or by reason of said Judgment or having or attempting to have a writ of execution issued on or by reason of said Judgment, pending the final determination of this matter on appeal.

IT IS FURTHER ORDERED AND DIRECTED that the defendant and appellant give a bond on appeal as security for costs, conditioned as required by law, in the sum of \$250-, and that defendant and appellant give a further bond on appeal in the sum of \$100000 to stay the said Judgment of October 5th, 1936, as herein provided, and that the said bond be expressly conditioned

that defendant and appellant will pay said Judgment and the interest thereon as therein provided in the event that said judgment is affirmed on appeal or otherwise becomes final.

Dated this 2 day of December, 1936.

Wm P. James
UNITED STATES DISTRICT JUDGE.

SERVICE of true copy of the within instrument was duly admitted this 2nd day of December, 1936.

Peirson M. Hall

Peirson M. Hall

United States Attorney

E. H. Mitchell

E. H. Mitchell

Special Assistant U. S. Attorney

Alva C. Baird

Alva C. Baird

Asst. United States Attorney

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 3 - 1936 R. S. Zimmerman
Clerk By L. B. Figg Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION FOR COSTS ON APPEAL

DOUGLAS FAIRBANKS, Defendant in the above action, having filed, or being about to file a petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment filed and entered in this matter in this Court against the Defendant and in favor of the Plaintiff, on the 5th day of October, 1936.

NOW, THEREFORE, in consideration of the premises, the undersigned FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant, and does acknowledge itself justly bound in the sum of Two Hundred Fifty and No/100-- Dollars (\$250.00) that it will pay all costs and damages which may be awarded against the Appellant on the said appeal, or on the dismissal thereof; and the undersigned Surety further consents that in case of default or contumacy on the part of the said Appellant, execution to the amount named in this stipulation may issue against the goods, chattels and lands of the undersigned.

IN WITNESS WHEREOF, the corporate seal and the name of the said Surety is hereto affixed and attested at Los Angeles, California, by its duly authorized officers, this 4th day of December, A. D., 1936.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

[Seal]

By W. H. Cantwell

W. H. Cantwell—Attorney in Fact.

Attest S. M. Smith

S. M. Smith—Agent

Examined and recommended for approval in accordance with Rule 28.

John B. Milliken
Attorney

Approved this 5 day of December, 1936.

Wm. P. James
District Judge.

STATE OF CALIFORNIA }
County of Los Angeles } ss.

On this 4th day of December, 1936, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons
Notary Public in and for the State of California, County
of Los Angeles.

My Commission Expires May 3, 1938

[Endorsed]: Filed Dec. 5, 1936 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

UNDERTAKING ON APPEAL AND TO STAY
EXECUTION

WHEREAS, DOUGLAS FAIRBANKS, Defendant in the above entitled action, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against Douglas Fairbanks, Defendant in said action, in the District Court of the United States in and for the Southern District of California, Central Division, in favor of the United States of America, Plaintiff in said action on the 5th day of October, 1936, for the sum of Seventy-two Thousand One Hundred Eighty Six and 94/100 - - Dollars (\$72,-186.94), and interest from July 6th, 1933 to October 5th, 1936 amounting to Sixteen Thousand Four Hundred Twenty Two and 53/100 - - Dollars (\$16,422.53), and

WHEREAS, the Appellant is desirous of staying the execution of the said judgment so appealed from.

NOW, THEREFORE, in consideration of the premises, and of such appeal, the undersigned, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant, and does acknowledge itself justly bound in the sum of One Hundred Thousand and No/100 - - Dollars \$(100,000.00), being the amount fixted by the United

States District Court for the Southern District of California, Central Division, in its order allowing appeal and supersedeas, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the Appellant will pay to the Respondent the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the Appellant upon the appeal; and that if the Appellant does not make such payment within thirty (30) days after the filing of the remittitur from the Circuit Court of Appeals in the Court from which the appeal is taken, judgment may be entered in said action on motion of the Respondent (and without notice to the undersigned Surety) in its favor against the said Surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the Appellant upon the appeal.

IN WITNESS WHEREOF the corporate seal and the name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its duly authorized officers, this 4th day of December, A. D. 1936.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

By W. M. Walker

[Seal]

W. M. Walker - Attorney in Fact

Attest S. M. Smith

S. M. Smith - Agent

STATE OF CALIFORNIA)
County of Los Angeles) ss:

On this 4th day of December, 1936, before me Theresa Fitzgibbons, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and S. M. Smith known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] Theresa Fitzgibbons

Notary Public in and for the State of California,
County of Los Angeles

My Commission Expires May 3, 1938

Examined and recommended for approval in accordance
with Rule 28.

John B. Milliken

Attorney

Approved this 5 day of December, 1936.

Wm. P. James

District Judge

[Endorsed]: Filed Dec. 5, 1936. R. S. Zimmerman,
Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR CROSS-APPEAL

TO THE ABOVE-ENTITLED COURT AND TO
HONORABLE WM. P. JAMES, JUDGE THERE-
OF:

Your Petitioner, the Plaintiff in the above-entitled cause respectfully shows that Douglas Fairbanks, the defendant in the above-entitled cause has been allowed an appeal herein from the judgment entered herein October 5, 1936, in this cause, and your Petitioner also considers itself aggrieved by said judgment as entered herein, and therefore hereby prays for the allowance of a cross-appeal from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment, and in connection with this petition Petitioner hereby presents Assignment of Errors dated December 29, 1936.

Peirson M. Hall

PEIRSON M. HALL,

United States Attorney

E. H. Mitchell

E. H. MITCHELL,

Special Assistant United States Attorney.

Alva C. Baird

ALVA C. BAIRD,

Assistant United States Attorney,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 29, 1936. R. S. Zimmerman,
Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA,)
Plaintiff and Cross-Appellant,)
-v-) No. 6680-J
DOUGLAS FAIRBANKS,)
Defendant and Cross-Appellee.)

PLAINTIFF'S AND CROSS-APPELLANT'S
ASSIGNMENT OF ERRORS.

The Plaintiff and Cross-Appellant above named makes and files the following Assignment of Errors upon which it will rely in the prosecution of its cross-appeal from the judgment of this Court entered therein on the 5th day of October, 1936:

I

The Court erred in entering judgment allowing plaintiff and cross-appellant recovery of interest from July 6, 1933, the date of demand for the return of the amount erroneously refunded, in that the plaintiff, under the law and the evidence, is entitled to interest from January 26, 1932, the date of payment of the erroneous refund involved.

II

The Court erred in failing and refusing to enter judgment allowing plaintiff recovery of interest at the rate of six per cent per annum from January 26, 1932, the date of payment of the erroneous refund involved in that the plaintiff, under the law, the pleadings, and the evidence, is entitled to interest at the rate of six per cent per annum from that date.

III

The Court erred in failing and refusing to enter judgment allowing Plaintiff recovery of interest at the rate of six per cent per annum from January 26, 1932, the date of payment of the erroneous refund, as provided by the provisions of Section 803, Title VI, of the Revenue Act of 1936.

IV

The Court erred in not granting the Plaintiff's and Cross-Appellant's Motion made at the conclusion of the trial for judgment in its favor as prayed for in the Complaint for the reason that said Motion was supported by both the law and the evidence in the case.

WHEREFORE the Plaintiff and Cross-Appellant prays that said Judgment may be reversed and that the Circuit Court of Appeals for the Ninth Circuit render a proper Order and Judgment on the record, and prays for such other and further relief as to the Court may seem just and proper in the premise.

Dated: This 29th day of December, 1936.

Pearson M. Hall

PEIRSON M. HALL,

United States Attorney.

E. H. Mitchell

E. H. MITCHELL,

Special Assistant U. S. Attorney.

Alva C. Baird

A. C. BAIRD,

Assistant United States Attorney.

Assistant United States Attorney.

[Endorsed]: Filed Dec 29 1936 R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER ALLOWING CROSS-APPEAL

The Plaintiff herein, United States of America, having filed its petition for cross-appeal from the judgment entered herein, together with its assignment of errors herein.

IT IS HEREBY ORDERED that the cross appeal prayed for in said petition of Plaintiff in the above-entitled cause is allowed.

Dated December 29, 1936.

Wm. P. James.

WM. P. JAMES

[Endorsed]: Filed Dec. 29 - 1936 R. S. Zimmerman,
Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION RE CONTENTS OF RECORD ON
APPEAL AND CROSS-APPEAL.

WHEREAS an appeal has been taken by each of the parties to above entitled action from the Judgment rendered therein:

Now therefore, pursuant to the provisions of Revised Statutes Sec. 1013 (28 U. S. C. A. 864), IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective counsel undersigned, that the following documents and papers shall constitute the record upon defendant's appeal to the Circuit Court of Appeals for the Ninth Circuit and upon the plaintiff's cross-appeal to the same Appellate Court; and the Clerk of above Court is hereby requested to prepare one transcript of such record and transmit the same to the Clerk of said Circuit Court of Appeals for use upon both appeals, and include therein the following:

1. Bill of Complaint filed by plaintiff.
2. Amended Bill of Complaint filed by plaintiff.
3. Answer filed by defendant.
4. Motion for Judgment filed by defendant.
5. Decision made and entered in said cause by Judge William P. James on March 18, 1936.

6. Minutes of Judge James dated September 30, 1936.
7. Minutes entered on September 5, 1936.
8. Special Findings of Fact requested by defendant and found and adopted by the Court and filed in said cause as the Findings of Fact.
9. Conclusions of law requested by defendant and filed in said cause.
10. Judgment.
11. Defendant's Petition for Appeal, Order allowing Appeal and fixing bond, and Admission of Service thereof.
12. Cost Bond on Appeal.
13. Supersedes Bond on Appeal.
14. Defendant's Assignment of Errors.
15. Citation on Appeal.
16. Receipt of Service of Citation on Appeal.
17. Citation on Cross-Appeal.
18. Petition for Cross-Appeal.
19. Assignment of Errors on Cross-Appeal.
20. Order Allowing Cross-Appeal.
21. Clerk's Certificate and this Stipulation.

It is further stipulated that the plaintiff-cross-appellant shall pay \$..... of the cost of printing such trans-

script and that the defendant-appellant shall pay the balance thereof.

Dated this 12th day of January, 1937.

Dennis F. O'Brien

Dennis F. O'Brien

Arthur F. Driscoll

Arthur F. Driscoll

Paul Vallee

Paul Vallee

Citizens Bk. Bldg.

Los Angeles, Calif.

John B. Milliken

John B. Milliken

Bk. of Amer. Bldg.

Los Angeles.

Attorneys for Defendant.

Peirson M. Hall

Peirson M. Hall

United States Attorney.

E. H. Mitchell

E. H. Mitchell

Asst. U. S. Attorney.

Alva C. Baird

Asst. U. S. Attorney.

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 15, 1937. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 103 pages, numbered from 1 to 103 inclusive, to be the Transcript of Record on Appeal in the above-entitled cause, as printed by the appellant and cross-appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; citation on cross-appeal; complaint; amended complaint; answer; motion for judgment; opinion and order; order of September 5, 1936; special findings of fact; order of September 30, 1936; judgment; conclusions of law requested by the defendant; petition for appeal; assignment of errors; order allowing appeal, stipulation for costs on appeal filed by appellant, and undertaking on appeal filed by appellant; petition for cross-appeal; assignment of errors on cross-appeal and order allowing cross-appeal filed by appellee, and stipulation re contents of record on appeal and cross-appeal.

I do further certify that the amount paid for printing the foregoing record on appeal by the appellant is \$63.31 and the amount paid by the cross-appellant is \$58.56 and that said amount will be paid the printer by the cross-appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and

certifying the foregoing Record on Appeal amount to \$16.25 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 20th day of January, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-first.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed
Jan. 26, 1937. Paul P. O'Brien, Clerk.



NO. 8444

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

**DOUGLAS FAIRBANKS,
Appellant and Cross-Appellee,**

vs.

**UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.**

**Upon Appeals from the District Court of the United
States for the Southern District of California,
Central Division.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

May

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8444

DOUGLAS FAIRBANKS,
Appellant and Cross-Appellee,
vs.

UNITED STATES OF AMERICA,
Appellee and Cross-Appellant.

MOTION TO PRESENT QUESTION OF
JURISDICTION AND TO FILE SUPPLE-
MENTAL BRIEF IN SUPPORT THEREOF

Comes now counsel for the defendant and respectfully requests the right to present to the Court a manifest question of jurisdiction plainly appearing from the record in this cause and to submit a supplemental brief in support thereof. As cause therefor and in support thereof counsel for the defendant submits that this action was instituted and is maintained by the United States of America under and pursuant to Section 610(b) of the Revenue Act of 1928 (26 U. S. C. A. 1646; 45 Stat. 875; Allegation XIII of Complaint—R. 11) which provides:

“Sec. 610. Recovery of Amounts Erroneously Refunded.—

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be

considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later."

It will thus be observed from the aforesaid statute that suit may be brought in the name of the United States, thereby providing and conferring jurisdiction, and the suit must be begun before the expiration of two years after the making of the alleged erroneous refund.

The Commissioner of Internal Revenue approved the certificate of overassessment to the defendant with respect to the refund of taxes here at issue for the years 1927, 1928 and 1929 on January 6, 1932. (Special Finding of Fact XXXIV—R. 72).

The defendant received the checks of the Disbursing Clerk of the United States Treasury constituting the alleged erroneous refunds on January 26, 1932 (R. 72 and 73).

Complaint on behalf of the United States of America was filed in this cause on January 20, 1934 (R. 24) and amended complaint was filed on May 23, 1934 (R. 42).

Section 1104 of the Revenue Act of 1932 (26 U. S. C. A. 1670(3); 47 Stat. 287) provides as follows:

"Sec. 1104. Date of Allowance of Refund or Credit.—Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any

internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

Since Section 610(b) of the Revenue Act of 1928, supra, provided jurisdiction of suits of this nature to be brought in the name of the United States, and since Section 1104 of the Revenue Act of 1932, supra, provides that the date of the allowance of refund shall be the date when the Commissioner of Internal Revenue signs the certificate of overassessment, and since it clearly appears from the record (R. 72) that the certificate of overassessment was approved in the case at bar on January 6, 1932, and it clearly appears from the record that the complaint in the name of the United States was filed on January 20, 1934 (R. 24), it therefore is manifestly clear from the record that neither the court below nor this court has jurisdiction of this cause.

The Circuit Court of Appeals for the Third Circuit, in the case of United States of America v. Robert K. Wurts, decided July 13, 1937 (not yet reported in Federal Reporter but found at Paragraph 9431 of Commerce Clearing House 1937 Service) decided that a suit for the recovery of an alleged erroneous refund must be brought within two years from the date the certificate of overassessment was signed by the Commissioner of Internal Revenue and not within two years from the receipt of the refund check by the taxpayer.

Wherefore, it is respectfully moved that this Court decide and determine that it is without jurisdiction in this cause and that permission be granted counsel for defendant to file supplemental brief in support of this motion.

Respectfully submitted,

DENNIS F. O'BRIEN

ARTHUR F. DRISCOLL

PAUL VALLEE

Citizens Bank Building,

Los Angeles, California

JOHN B. MILLIKEN

Bank of America Building,

Los Angeles, California

Attorneys for Defendant

Dated: This 19th day of August, 1937.

[Endorsed]: Filed Aug. 20, 1937. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION

Sirs:

Please Take Notice that upon the annexed affidavit of Paul Vallee, sworn to the 27th day of September, 1937, and upon the record on appeal now on file with this court, and upon all the proceedings had herein, and upon the supplemental brief which it is proposed to file herein, a copy of which is annexed hereto and made part hereof, we shall move this court at the opening thereof on the 29th day of

October, 1937, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the courtroom of the United States Circuit Court of Appeals for Ninth Circuit, Room 326, in the United States Court House and Postoffice Building, Seventh and Mission Streets, San Francisco, California, for the following relief:

- (1) That Douglas Fairbanks, as appellant, be permitted to file with this court a supplemental brief, a copy of which is made part of these motion papers, and that the said supplemental brief and the questions raised therein be considered by this court on this appeal.
- (2) That this court reverse the judgment entered herein in the District Court in favor of the United States of America and against the said Fairbanks, and order that the complaint herein be dismissed.
- (3) That petitioner have such other and further relief as to the court may seem just and proper.

Dated: Los Angeles, California, September 27, 1937.

DENNIS F. O'BRIEN,
ARTHUR F. DRISCOLL,
152 West 42nd Street,
New York, N. Y.
PAUL VALLEE,
Citizens National Bank Building,
Los Angeles, California,
JOHN B. MILLIKEN,
Bank of America Building,
Los Angeles, California,
Attorneys for Douglas Fairbanks,
Appellant.

To:

PEIRSON M. HALL

United States Attorney,

E. H. MITCHELL

Special Assistant United States Attorney,

ALVA C. BAIRD

Assistant United States Attorney

Attorneys for United States of America.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION

State of California,

County of Los Angeles—ss.

Paul Vallee, being duly sworn, says:

I am an attorney and counsellor at law. I am of counsel to Douglas Fairbanks, appellant and cross-appellee herein, and I am personally familiar with all the proceedings had herein. I am making this affidavit rather than Douglas Fairbanks because many of the matters herein are known to him only as matters of hearsay, and for the further reason that he is at present absent from the country.

This appeal involves a judgment in favor of the Government and against the said Fairbanks in the sum of \$88,609.45 [R. 77].

The issue involved in the action below was whether or not the Government was entitled to recover back from the said Fairbanks as taxpayer certain refunds

that had been made by the Government to the said taxpayer.

The object of this motion is to obtain the permission of this court for the filing of a supplemental brief (a copy of which is attached hereto) which raises for the consideration of this court the question of whether or not this action was begun by the Government within the period of limitation of two years fixed by section 610 of the Revenue Act of 1928.

On the 6th day of January, 1932, the Commissioner of Internal Revenue approved the certificate of overassessment to the said Fairbanks, as taxpayer. [Special Finding of Fact, R. 72].

On the 26th of January, 1932, the Government made the refunds by checks of the Disbursing Clerk of the United States Treasury [R. 72 and 73].

On January 20, 1934, action on behalf of the United States of America was begun against the taxpayer [R. 24].

The aforesaid facts which appear from the record show that the action was begun within the period of limitation set by section 610 of the Revenue Act of 1928 if the two-year term fixed therein is construed to run from the payment of the checks, but that the action was not begun within the period of limitation if the two-year term in question is construed to run from the date of the approval of the certificate of overassessment.

It is conceded that a defense based upon the period of limitation has been waived and that the question was not raised during the trial.

The Two-Year Limitation in Section 610 Is Not One That Need Be Pleaded by Defendant. The Limitation Is a Condition Upon the Right.

Atlantic Coast Line Railroad v. Burnette,
239 U. S. 199;

United States v. Trollinger, 81 Fed.(2d) 167;
Tutsch v. U. S. Director General of Railways,
52 Cal. 650;

Stern v. La Compagnie Generale Trans-
atlantique, 110 Fed. 996.

But the question of the period of limitations was not overlooked.

At that time the only direct authority on the subject was the case of Paulson v. United States, 78 Fed.(2d) 97, a decision by the Circuit Court of Appeals of the Tenth Circuit as of June 14, 1935. The said decision held that the two-year period of limitation dated only from the return of the money to the taxpayer. Counsel for the defendant in this action accepted the Paulson case as law, and decided therefore not to press the question of limitations upon the trial.

Counsel for the defendant did state that he was not going to raise the question of limitations, but the position of the Government was not prejudiced in any way thereby. Counsel's statement came about during the cross-examination of one Clarence Ericksen, business manager for the defendant. The cross-examination was being conducted by Mr. Baird. It was as follows:

"By Mr. Baird:

Q. Mr. Ericksen, how long have you been

business manager for Mr. Fairbanks?

A. I have been associated with Mr. Fairbanks since the fall of 1920.

Q. That is, continuously?

A. Yes.

Q. Have you been handling Mr. Fairbanks' affairs during his absence in England and other points on the other side of the Atlantic during the period immediately prior to the time this action was filed?

A. Yes.

Q. This suit was filed on January 20, 1934, and was Mr. Fairbanks in California at that time?

A. No.

Q. Where was he residing at that time, do you know?

A. He had no permanent residence.

Q. Was he in the United States?

A. No; he was not.

Q. How long had he been absent from the United States prior to that date?

A. I think sometime in May. I believe he left prior to May, '33, I think it was.

Q. May of 1933?

A. I believe so.

Q. And then prior to May, 1933, had he been absent from the United States for some extended time?

Mr. Driscoll: We are not going to raise any question of limitations.

Mr. Baird: Very well.

Mr. Driscoll: We so stated to the Attorney General a long time ago."

However, since the trial of this action was had, the question of the construction to be placed upon the provisions of section 610 of the Revenue Act of 1928 has been passed upon by the Circuit Court of Appeals of the Third Circuit, which has held that the period of limitation begins to run from the date of the approval of the certificate of overassessment, and not from the date of the return of the checks as decided by the Circuit Court of Appeals of the Tenth Circuit.

U. S. v. Robert K. Wurts, decided July 13, 1937, (Paragraph 9431 of Commerce Clearing House, 1937 Service).

Therefore there has been a complete change in the interpretation of section 610 of the Revenue Act of 1928 since the trial of this action.

Our Courts, Including the Supreme Court of the United States, Have Repeatedly Taken Notice of Changes in the Law That Have Taken Place During the Pendency of Appeals.

In Watts v. Unione Austriaca, 248 U. S. 9 at 21, Justice Brandeis said:

"This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require."

Justice Brandeis then continues:

"And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below. (Citing a great many cases)."

See also:

Butler v. Eaton, 141 U. S. 240;
Nemours v. Richmond Guano Co., 297 Fed.
580, C. C. A. 4;
American Sugar Refining Co. v. New Orleans,
119 Fed. 691;
Meccano v. Wanamaker, 253 U. S. 136.

There Is No Question of Fact Involved. As Pointed Out Above the Record on Appeal Definitely Sets Forth the Dates Involved.

The absence of defendant Fairbanks from the country part of the two years in question, would not extend the period of limitations nor toll the statute. There is no exception contained in the terms of the statute. Section 610 of the Revenue Act of 1928 reads:

"Sec. 610. Recovery of Amounts Erroneously Refunded.

(b) Any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under Section 608) may be recovered by suit brought in the name of the

United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later."

The operation of a statute of limitations is not suspended or postponed by the absence or non-residence of the debtor, unless such an exception is part of the statute.

Kendall v. U. S., 107 U. S. 123;

Amy v. City of Watertown, 130 U. S. 320;

McIver v. Ragan, 2 Wheaton 25;

Bank of Alabama v. Dalton, 9 Howard 522.

The fact that the State of California may have placed in its Statute of Limitations exceptions based upon absence from the state or country or non-residence does not affect the situation. The suit at bar is based solely upon a federal statute, namely, the Internal Revenue Act of 1928. The construction that is sought is a construction of that statute, and not of any California law.

The Appellant Is Not Necessarily Precluded From Raising This Question at This Time Simply Because He Failed to Raise the Question in the Court Below Nor Because It Was Not Included in the Assignment of Errors.

A case directly in point is Dobbins v. Commissioner of Internal Revenue, 31 Fed.(2d) 935, decided by the Circuit Court of Appeals of the Third

Circuit. That case involved the Statute of Limitations. At page 937 the court said:

"But the defense of the Statute of Limitations was not raised before the Board of Tax Appeals until after argument had been made. Thereafter the petitioner made application to the Board to reopen the case so that he might raise this defense, but it refused to do so. However, we may consider and dispose of a case on a question not raised by the court below. U. S. v. Florence E. Williams, 49 S. Ct. 97, 73 L. Ed. (decided January 2, 1929), Rule 11 of this court. Any liability which the petitioner might have had was extinguished before this suit was brought, and the judgment against him for the supposed liability is reversed."

The rules of this court provide that the court on its own motion may notice an error not assigned (Rule 11), a similar rule existing in the United States Supreme Court. In the case of U. S. v. Pena, 175 U. S. 500, where there were no assignments of error contained in the record, the Supreme Court took jurisdiction and disposed of the case upon the facts set forth in the record, predicating its decision upon an issue not raised in either the District Court or the Circuit Court of Appeals.

At page 502 the court said:

"A third proposition is that no assignment of errors is annexed to the transcript as required by sections 997 and 1012 of the revised Statutes. But this is not sufficient to compel a

dismissal of the appeal. Paragraph 4 of Rule 21 of this court provides that the court may at its option notice a plain error not assigned. *School District v. Hall*, 106 U. S. 428, 27 L. Ed. 237, 1 Sup. Ct. Rep. 417."

In the case of *U. S. v. Williams*, 278 U. S. 314, the court makes it clear that the case is being disposed of upon an issue not raised in the lower tribunal, for the court says:

"We do not find it necessary to determine whether this view or that of the District Court is correct, but dispose of the case upon a ground urged here by the Government, but apparently it is fair to say not suggested to either court below."

The object of the rule is patent and its purposes wholesome. It enables an appellate tribunal to dispose of a case as justice may dictate, and precludes the possibility of continuing an injustice brought about by an inadvertent omission. Such objective was clearly recognized by the Circuit Court of Appeals for the First Circuit in the case of *Gandia v. Porto Rico Fertilizer Co.*, 2 Fed.(2d) 641.

At page 644 the court said:

"But no assignment of error has in any one of the three cases before us (numbers 1594, 1604 and 1777) brought up this matter for review by this court. Clearly these suits against the Fertilizer Company are but steps towards final adjustment of the accounts between the former

partners. We refer to this unassigned error as to the money judgment, rendered in number 1604 against the Fertilizer Company, less the amount involved, but overlooked in the final adjustment of the partnership accounts."

If action was not begun within the two-year period stipulated, the Government has no cause of action.

In Miller v. United States, 57 Fed.(2d), 889, District Judge Inch (E. D. N. Y.) had before him a claim on a war risk policy. At page 890 he said:

"The action was not commenced within the period specified by the statute. This is not a question of laches which could be waived by counsel or overlooked by the court, but is in my opinion a jurisdictional defect, and renders this court without jurisdiction to decide the case."

Wherefore, deponent petitions this court that Douglas Fairbanks be granted the relief set forth in the notice of motion.

PAUL VALLEE

Sworn to before me this 27 day of September, 1937.

[Seal] ORAETTA G. EHLERS,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Sept. 30, 1937.

[Title of Circuit Court of Appeals and Cause.]

**NOTICE OF MOTION AND MOTION FOR
WRIT OF CERTIORARI FOR DIMINU-
TION OF RECORD.**

Service of copy acknowledged this first day of October, 1937.

JOHN B. MILLIKEN.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION.

To Douglas Fairbanks, Appellant and Cross-Appellee, and to Dennis F. O'Brien, Arthur F. Driscoll, Paul Vallee, and John B. Milliken, his attorneys:

You and each of you will please take notice that the Appellee and Cross-Appellant will bring the Motion, a copy of which is hereinafter attached, on for hearing before the United States Circuit Court of Appeals at San Francisco at the hour of 10:00 a. m. on the 29th day of October, 1937.

HOMER S. CUMMINGS.

Attorney General.

BEN HARRISON,

United States Attorney.

E. H. MITCHELL,

Ass't U. S. Attorney.

ALVA C. BAIRD,

Ass't U. S. Attorney.

[Title of Circuit Court of Appeals and Cause.]

**MOTION FOR WRIT OF CERTIORARI FOR
DIMINUTION OF RECORD.**

Since the above proceeding was docketed in this Court, two motions, one in typewritten form, and the other printed, have been served upon the Appellee by counsel for the Appellant. By these motions the Appellant, for the first time in this litigation, attempts to raise an issue of the statute of limitations.

Now, Therefore, comes the Appellee and Cross-Appellant, through its counsel, and moves the Court for a Writ of Certiorari for Diminution of the Record, and asks leave to incorporate as a part of the record on appeal those portions of the Official Court Reporter's transcript wherein an oral waiver and stipulation was made in open Court during the course of the trial by the parties hereto, through their respective attorneys, wherein all contentions that the instant suit was not timely begun were expressly waived by the defendant (now the Appellant and Cross-Appellee), as more particularly appears from the portion of the Official Reporter's transcript, a duly certified and approved copy of which is hereinafter attached.

This waiver and stipulation is essential and pertinent to a proper consideration of the Motion of the Appellant and Cross-Appellee. It was not heretofore incorporated as a part of the record on appeal as it is not pertinent or material to a determination

of any of the errors assigned by the Appellant and upon which this appeal is predicated.

Respectfully submitted,
HOMER S. CUMMINGS,
Attorney General.
BEN HARRISON,
United States Attorney.
E. H. MITCHELL,
Ass't U. S. Attorney.
ALVA C. BAIRD,
Ass't U. S. Attorney.

Dated: October 1, 1937.

State of California,
County of Los Angeles—ss.

Alva C. Baird, being first duly sworn, deposes and says: That he is a duly appointed and acting Assistant United States Attorney for the Southern District of California, and one of the attorneys for the Appellee and Cross-Appellant in the above-entitled action; that he has read the foregoing Motion and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

ALVA C. BAIRD.

Subscribed and sworn to before me this 1st day of October, 1937.

[Seal]

R. S. ZIMMERMAN.

Clerk U. S. District Court, Southern
District of California.

By EDMUND L. SMITH.

Deputy.

It is hereby certified that the following excerpts of the Reporter's Transcript are true and correct and it is ordered that the same be filed.

WM P. JAMES,

Judge.

[Certified Copy]

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 6680-J

DOUGLAS FAIRBANKS,

Appellant and Cross-Appellee,

v.

UNITED STATES OF AMERICA.

Appellee and Cross-Appellant.

STIPULATION.

It is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that the following two pages, hereinafter attached, are excerpts from the Reporter's Transcript of proceedings in the trial of the above-entitled case in the District Court for the Southern Judicial District of California, and that the Re-

porter's Transcript correctly reports the testimony had in this cause.

Dated: September 30, 1937.

HOMER S. CUMMINGS,

Attorney General.

BEN HARRISON,

United States Attorney.

E. H. MITCHELL,

Ass't U. S. Attorney.

ALVA C. BAIRD,

Ass't U. S. Attorney.

Attorneys for Appellee and Cross-Appellant.

DENNIS F. O'BRIEN,

ARTHUR F. DRISCOLL,

PAUL VALLEE,

JOHN B. MILLIKEN.

Attorneys for Appellant and Cross-Appellee.

[Title of District Court and Cause.]

**REPORTER'S TRANSCRIPT OF
PROCEEDINGS.**

Los Angeles, California.

November 19, 1935.

Reported by: A. M. Randol.

Cross Examination

By Mr. Baird:

Q. Mr. Erickson, how long have you been business manager for Mr. Fairbanks?

A. I have been associated with Mr. Fairbanks since the fall of 1920.

Q. That is, continuously?

A. Yes.

Q. Have you been handling Mr. Fairbanks' affairs during his absence in England and other points on the other side of the Atlantic during the period immediately prior to the time this action was filed?

A. Yes.

Q. This suit was filed on January 20, 1934, and was Mr. Fairbanks in California at that time?

A. No.

Q. Where was he residing at that time, do you know?

A. He had no permanent residence.

Q. Was he in the United States?

A. No; he was not.

Q. How long had he been absent from the United States prior to that date?

A. I think sometime in May. I believe he left prior to May '33, I think it was.

Q. May of 1933?

A. I believe so.

Q. And then prior to May, 1933, had he been absent from the United States for some extended time?

Mr. Driscoll: We are not going to raise any question of limitations.

Mr. Baird: Very well.

Mr. Driscoll: We so stated to the Attorney General a long time ago.

[Endorsed]: Filed Oct. 1, 1937.

R S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk.

It is certified that the foregoing is a true and correct copy of Stipulation and Order filed in the above-entitled cause as the same appears from the original remaining on file in my office.

Witness my hand and the seal of the said Court this 1st day of October, 1937.

[Seal]

R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk.

[Endorsed]: Filed October 2, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, October 29,
1937.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

[Title of Cause.]

**ORDER GRANTING MOTIONS, AND
SUBMITTING CAUSE**

Ordered motion of appellant Fairbanks for leave to file supplemental brief presented by Mr. Arthur F. Driscoll, counsel for said appellant, and motion granted.

Further ordered motion of United States for writ of certiorari for diminution of record presented by Mr. Joseph M. Jones, Special Assistant to the Attorney General, counsel for appellee and cross-appellant and submitted and motion granted.

Further ordered appeal and cross-appeal argued by Mr. Arthur F. Driscoll, counsel for Douglas Fairbanks, and by Mr. Joseph M. Jones, Special Assistant to the Attorney General, counsel for United States, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday, April 2,
1938.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING JUDG-
MENT.

By direction of the Court, ordered that the type-
written opinion this day rendered by this court in
the above cause be forthwith filed by the clerk, and
that a judgment be filed and recorded in the minutes
of this court in the above cause in accordance with
the opinion rendered therein.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeals from the District Court of the
United States for the Southern District of Cali-
fornia, Central Division.

OPINION

Before Garrecht, Mathews and Haney,
Circuit Judges.

Mathews, Circuit Judge:

The United States (hereafter called plaintiff)
brought this action against Douglas Fairbanks

(hereafter called defendant) to recover amounts aggregating \$72,186.94 claimed to have been erroneously refunded to defendant on account of alleged overpayments of income taxes for 1927, 1928 and 1929, with 6% interest from the date of refund, January 26, 1932. The case was tried by the court without a jury, trial by jury having been expressly waived. The court made and filed special findings of fact and thereupon entered judgment in favor of plaintiff for the principal sum claimed, with 7% interest from the date (July 6, 1933) on which payment had been demanded of defendant. Both parties have appealed, plaintiff claiming that interest should have been allowed from the date of refund, defendant claiming that judgment should have been entered in his favor.

The action was brought under § 610(b) of the Revenue Act of 1928, 45 Stat. 875, 26 U.S.C.A. § 1646(b), which provides: "Any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded . . . may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund."

Section 1104 of the Revenue Act of 1932, 47 Stat. 287, 26 U.S.C.A. § 1670(a) (3), provides: "Where the Commissioner has (before or after June 6, 1932) signed a schedule of overassessments in respect of any internal revenue tax imposed by the Revenue Act of 1932, or any prior revenue Act, the

date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

In this case, the schedule of overassessment was signed by the Commissioner on January 6, 1932. The refund check was delivered to the taxpayer on January 26, 1932. This suit was begun on January 20, 1934, more than two years after the signing of the schedule, but less than two years after the delivery of the refund check. Defendant contends that the two-year period specified in § 610(b) begins to run upon allowance of the refund—that is to say, upon the signing of the schedule by the Commissioner—and that this action, therefore, was not commenced in time. There is no merit in this contention. The two-year period commences, not upon the allowance, but upon the actual making of the refund. *United States v. Wurts*, U.S....., decided March 14, 1938.¹ This action was in time.

The trial court's findings of fact are not challenged. Facts found were as follows:

Defendant in 1925 became the owner and registered holder of debenture bonds of the Elton Corporation of the par value of \$4,000,000, dated March 5, 1925, payable March 5, 1935. Each bond contained the following provision: "This debenture bond may be redeemed by the corporation at any

¹Reversing *United States v. Wurts* (C.C.A. 3), 91 F.(2d) 547, cited by defendant.

time at its face value plus interest earned and unpaid hereon upon thirty days' notice to the registered holder thereof." In 1927, 1928 and 1929, the corporation did so redeem bonds held by defendant, of the aggregate par value of \$1,900,000, and defendant realized therefrom a taxable gain.

The question now to be decided is whether the gain so realized by defendant was a "capital gain," within the meaning of § 208(a)(1) of the Revenue Act of 1926, 44 Stat. 19, and § 101(c)(1) of the Revenue Act of 1928, 45 Stat. 811. If so, it was taxable at the rate of 12½%.² If not, it was taxable at the higher (normal and surtax) rates³ applicable to other income of defendant for the taxable years in question.

By §§ 208(a)(1) and 101(c)(1) the term "capital gain" is defined as meaning "taxable gain from the sale or exchange of capital assets consummated after December 31, 1921." It is conceded that the bonds in question were capital assets, and that they were redeemed after December 31, 1921. The question is whether such redemption constituted a "sale or exchange" of the bonds, within the meaning of §§ 208(a)(1) and 101(c)(1).

We think not. Between the *redemption* of a bond

²Revenue Act of 1926, § 208(b), 44 Stat. 20; Revenue Act of 1928, § 101(b), 45 Stat. 811.

³Revenue Act of 1926, §§ 210(a), 211(a), 44 Stat. 21; Revenue Act of 1928, §§ 11, 12(a), 45 Stat. 795, 796.

and the *sale or exchange* thereof, there is a clear distinction. Such redemption is merely the payment of an obligation according to its terms. It is in no wise a sale or exchange. Watson v. Commissioner, 27 B.T.A. 463, 465;⁴ Braun v. Commissioner, 29 B.T.A. 1161, 1177. [Italics are by the Court].

First of the revenue acts according special treatment to capital gains was that of 1921. The above quoted definition of "capital gain" is found in the 1921 and subsequent revenue acts to and including that of 1932. 42 Stat. 232, 43 Stat. 262, 44 Stat. 19, 45 Stat. 811, 47 Stat. 191. Defendant cites Report No. 350 of the House Ways and Means Committee and Report No. 275 of the Senate Finance Committee, accompanying the Revenue Bill of 1921, as indicating a purpose to include in this definition gains resulting from the redemption of capital assets. We find in these reports no indication of any such purpose. In Burnet v. Harmel, 287 U.S. 103, 106, cited by defendant, the court said:

"Before the Act of 1921, gains realized from the sale of property were taxed at the same rates as other income, with the result that capital gains, often accruing over long periods of time, were taxed in the year of realization at the high rates resulting from their inclusion in the higher surtax brackets. The provisions of the 1921 revenue act for taxing capital gains at a lower rate, reenacted in 1924 without material change, were adopted to relieve the

⁴Overruling Werner v. Commissioner, 15 B.T.A. 482, cited by defendant.

taxpayer from these excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conversions. House Report No. 350, Ways and Means Committee, 67th Cong., 1st Sess. on the Revenue Bill of 1921, p. 10; see *Alexander v. King*, 46 F.(2d) 235."

Thus, it appears, the purpose of Congress in relieving the taxpayer from "excessive tax burdens from gains resulting from a conversion of capital investments" was "to remove the deterrent effect of those burdens on such conversions." Conversions on which those burdens had a deterrent effect were sales and exchanges. Such burdens had, and have, no deterrent effect on the redemption of bonds or other capital assets. This, doubtless, is the reason why, prior to 1934, gains resulting from such redemption were never included in the definition of "capital gain." Whatever the reason, such gains were not so included, and the definition should not, we think, be expanded by judicial construction.

When Congress determined, as it did in 1934, to treat as "capital gains" gains resulting from the retirement of bonds issued by a government or corporation, it had no difficulty in expressing its intent in clear and unambiguous language. Revenue Act of 1934, § 117(f), 48 Stat. 715. If such intent had existed prior to 1934, it could and, we think, would have found similar expression.

In awarding judgment for the principal sum claimed, the trial court did not err. It erred to the

prejudice of plaintiff in allowing interest from the date of demand only. It erred to the prejudice of defendant in allowing interest at 7%. Section 610(d) of the Revenue Act of 1928, as amended by § 805(a) of the Revenue Act of 1936, 49 Stat. 1744, provides: "Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum per annum from the date of the payment of the refund." In this case, therefore, 6% interest should have been allowed from January 26, 1932.

As to the principal sum awarded (\$72,186.94), the judgment is affirmed. As to interest, it is reversed and the case is remanded, with directions to enter judgment in plaintiff's favor for 6% interest on said principal sum from January 26, 1932.

[Endorsed]: Opinion. Filed Apr. 2, 1938. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 8444.

DOUGLAS FAIRBANKS,
Appellant & Cross-Appellee,

vs.

UNITED STATES OF AMERICA,
Appellee & Cross-Appellant.

JUDGMENT.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause, as to the principal sum awarded (\$72,186.94), be and hereby is affirmed, and as to interest be and hereby is reversed, and that this cause be and hereby is remanded to the said District Court with directions to enter judgment in plaintiff's favor for 6% interest on the said principal sum from January 26, 1932.

[Endorsed]: Filed and entered April 2, 1938.
Paul P. O'Brien, Clerk.

[Title of Circuit Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Messrs. O'Brien, Driscoll & Raftery, counsel for the appellant & cross-appellee, and good cause therefor appearing. It Is Ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including June 4, 1938; and in the event the petition for a writ of certiorari to be made by the appellant & cross-appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT

United States Circuit Judge.

Date: San Francisco, California, April 25, 1938.

[Endorsed]: Filed Apr. 25, 1938. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIR-
CUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT, TO RECORD CERTI-
FIED UNDER RULE 38 OF THE RE-
VISED RULES OF THE SUPREME
COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and forty (140) pages, numbered from and including 1 to and including 140, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 3rd day of May A. D. 1938.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 16, 1959

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

A motion for leave to file a petition for rehearing and petition for rehearing having been filed in this case;

Upon consideration thereof, it is ordered by this Court that the said motion for leave to file and petition for rehearing be, and the same are hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the entry of judgment herein by the United States District Court for the Southern District of California, Central Division be, and it hereby is, stayed until further order of the Court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(10049)